AMERICAN LAW AND PROCEDURE

VOLUMES I TO XII PREPARED UNDER THE EDITORIAL SUPERVISION OF

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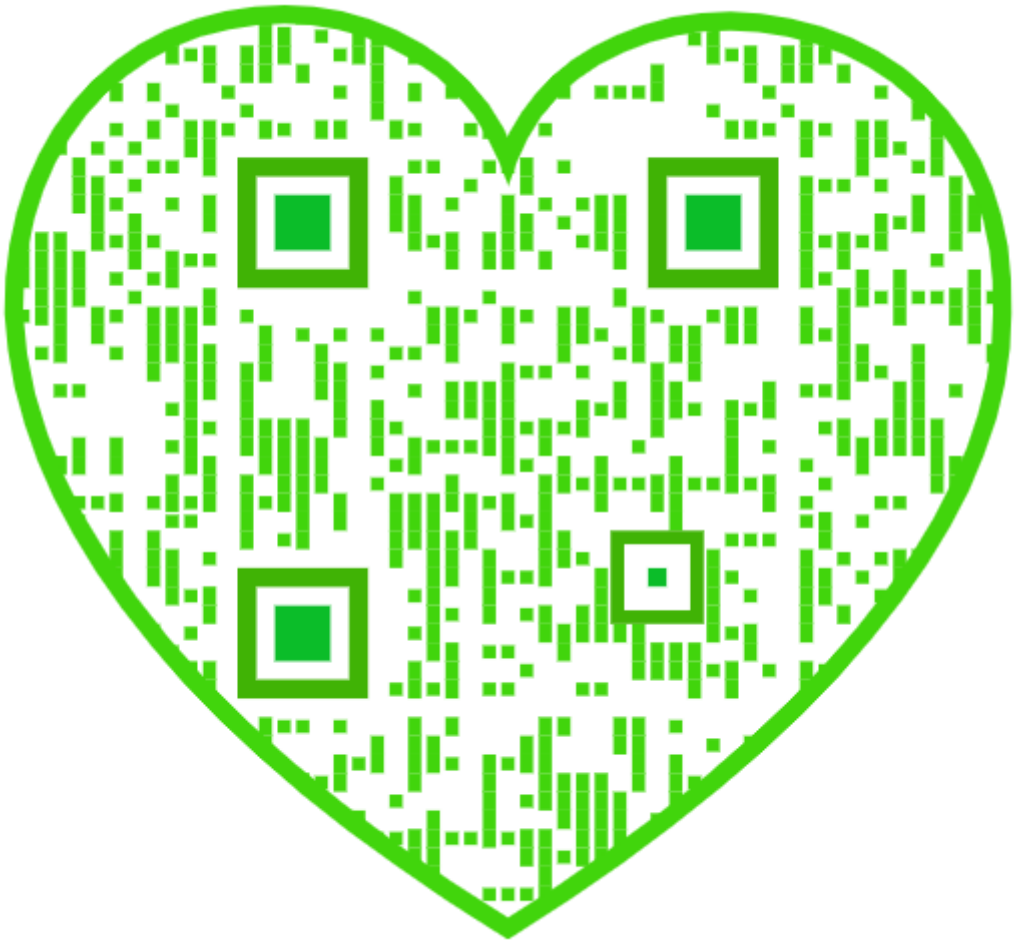
A Systematic, Non-Technical Treatment of American Law and Procedure, Written by Professors and Teachers in Law Schools, and by Legal Writers of Recognized Ability.

PUBLISHED BY
LA SALLE EXTENSION UNIVERSITY
CHICAGO
1917

91



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AMERICAN LAW AND PROCEDURE

VOLUME IX.

PREPARED UNDER THE EDITORIAL SUPERVISION OF

JAMES PARKER HALL, A. B., LL.B.

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MUNICIPAL CORPORATIONS

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PUBLIC OFFICERS

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EXTRAORDINARY REMEDIES

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CONFLICT OF LAWS

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MUNICIPAL CORPORATIONS

BY

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CHAPTER I.

PUBLIC CORPORATIONS IN GENERAL.

§ 1. **The conception of a corporation.** Many are the definitions which have been offered of a corporation. One of the most famous is that given by Chief Justice Marshall in the great case of Dartmouth College v. Woodward: "A corporation is an artificial being, invisible,

intangible, and existing only in the contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it. . . . Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual'' (1). We shall not attempt to criticise this definition, or any of the other definitions usually offered, in detail; nor indeed to fix upon any precise form of words as our own definition, but shall confine ourselves to an attempt to set forth as briefly as may be the fundamental conception of a corporation. If we emphasize in Marshall's statement the words, ''by which a perpetual succession of many persons are considered as the same, and may act as a single individual,'' we have taken a long step toward our goal. A group of natural persons, are, if incorporated, regarded by the law as one person, as endowed with a legal personality distinct from the personality of the individuals composing the corporation. ''To be a person, within the meaning of the private law, means to be capable of holding property, of having claims and liabilities'' (2). A natural person is a human being possessing, in the eye of the law, these capacities. At some stages in the development of law, not all human beings are recognized as legal persons. For example, if human beings are held in a state of complete slavery, they are rightless beings and so not persons in contemplation

(1) 4 Wheat. 518, 636.

(2) Sohm, Institutes of Roman Law, Sec. 20.

of law, but only chattels. "A slave, therefore, is a human being who is, legally, not a person but a thing" (3).

§ 2. **Its legal separateness from its members.** A corporation is not a natural person, but an aggregation of natural persons, the group being treated as one person by the law. The rights of the corporation, therefore, are not the rights of the members of the corporation, and the liabilities of the corporation are not the liabilities of the members of the corporation. If the corporation owns property, the members of the corporation do not own it; but the law regards the title as being vested in one person, the corporation (4). If the corporation enters into a contract, the members of the corporation as individuals are not bound by it, but only the juristic person, the corporation. For example, in one case a corporation sold out its business and agreed, as a part of the transaction, not to engage in the same kind of business for a period of time. Some of the officers of the corporation began to carry on the same kind of business within the time limited, and it was held they had a perfect right to do so, as they had not made any contract, but only the corporation (5). The general nature of a corporation is more fully discussed in the article on Private Corporations. Chapter I, in Volume VIII of this work.

§ 3. **Private and public corporations.** Corporations are created for two entirely distinct purposes, and may accordingly be divided into two classes corresponding to the objects for which they exist. These two classes are

(3) Sohm, Institutes of Roman Law, Sec. 21.

(4) City of Louisville v. McAteer, 26 Ky. L. R. 425.

(5) Hall's Safe Co. v. H. H. M. Safe Co., 146 Fed. 37.

called, respectively, private corporations and public corporations. Private corporations are corporations formed for the purpose of conducting operations which could be carried on by private natural persons, usually, though not always, for the purpose of financial profit to their members. Public corporations are formed solely for the purpose of assisting in the work of carrying on the government. Private corporations again are subdivided into two classes according to the nature of the business they carry on. Ordinary private corporations are engaged in undertakings in which the public as a whole are considered as having very little direct interest, such as, for example, the ordinary manufacturing or commercial corporations. Other private corporations, while not formed for the purpose of assisting in the actual administration of the government, are engaged in carrying on operations in which the public as a whole are rather directly interested, such as railway, water, gas, and electric light plants, telephones, telegraphs, etc. Such private corporations are best called, perhaps, public service corporations, though in the past they have often received the name of quasi-public corporations. This latter phrase is not exactly a happy one, for it tends to conceal the fact they are, like other private corporations, organized primarily for the purpose of private gain. Because of the semi-public character of the operations they carry on, however, they are subjected to a much larger degree of control by the government than the ordinary private commercial or manufacturing corporations. With neither of the classes of private corporations are we here concerned, but only with the public corporations as defined above.

§ 4. **Public corporations: Municipal and quasi-municipal.** A public corporation consists of a part of the people of a given state, residing within a given territorial district, who are by law organized into a corporation, i. e., endowed with a legal personality, for the purpose of assisting in carrying on the government within that district. Some of these corporations are what we may call urban public corporations, such as cities and villages, and others are rural public corporations, such as towns and counties. We shall see that for the purposes of the lawyer these two classes of urban and rural public corporations require for many reasons separate treatment. Very often the phrase "municipal corporations" is used to cover both classes, but more often it is applied only to the urban public corporations, the rural public corporations being then distinguished as quasi-municipal corporations. While it is the purpose of this article to deal with both classes, we shall in the future use the term "municipal corporation" in the narrower of the two senses above described, i. e., as including only urban public corporations, designating the rural corporations as quasi-municipal corporations. This latter term is not as happily chosen as one would wish, for it fails to bring out the actual legal situation as it exists today. It originates from the fact that the rural communities in England and in this country were originally, and to some extent today are, not endowed with legal personality, i. e., are not corporations, but only convenient administrative divisions for the administration of the central government. As time has gone on, they have in many instances been endowed to a limited extent with a legal personality, and

so have become "quasi-corporations," or, as the phrase usually is, quasi-municipal corporations. On the other hand the urban communities, so soon as they were organized as communities for aiding in the work of government, were granted by the crown of England charters which endowed them with a distinct legal personality.

§ 5. **Early municipal corporations in England: Purposes.** The reason for this difference in the development of the two classes cannot be given in detail within the limits of the space at our command. Briefly, the chief reasons may be stated as follows: The urban corporations arose in those portions of the country in which population became more dense than in other parts, so that a need existed for the regulation of problems arising from the very fact that this large aggregation of people lived within the limited area. The result was the granting to the people so situated of a series of governmental privileges, relating to police, judicial, or financial matters, bringing about the foundation of governmental institutions of a peculiar character, differing from those found in the surrounding country. These organizations thus were founded chiefly to satisfy the local needs arising from the existence of the thickly populated community as such, and not for the purpose of aiding in carrying on the general operations of the central government, and so it was convenient to endow this local community with a legal personality of its own. This was all the more desirable because in England it was customary to grant to these "municipal boroughs," as they were called, exemption from the jurisdiction of the usual tax officials of the king, and to allow them to collect the money due the

king in their own way, the corporation agreeing to pay a lump sum to the king in lieu of taxes. In addition, in the early Norman judicial system in England, there was in each county a popular court, presided over by the sheriff, which latter official was an appointee of the king, who stood at the head of the administration of the king's government in the county. The municipal boroughs were in many cases also exempted from the jurisdiction of these local courts, by special charter from the crown, of course on payment of a consideration for the privilege.

§ 6. **Same: Incorporation.** Inasmuch as the borough was based upon a grant, it was necessary, or at least desirable, to incorporate the community, or some portion thereof, to make it the recipient of the grant, and accordingly that was done. Perhaps the earliest municipal charter granted in England was that given to the borough of Kingston on Hull in 1429, but the movement for incorporation can hardly be said to have begun in earnest until the time of the Tudors (1485). The charters of incorporation did not, as they do today, make all the inhabitants members of the corporation, but only the more important citizens, such as the larger taxpayers, especially those who were members of the guilds which existed in those days. The corporate name accordingly was usually descriptive of this fact, e. g., "The Mayor, Aldermen and Common Council (or Commonalty)." This body, once constituted, perpetuated itself in many cases by co-optation; in others was elected by a very narrow body of freemen (6).

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(6) Goodnow, Comparative Administrative Law, I, 196.

§ 7. **Same: Powers.** The chief object of incorporating the municipal boroughs seems to have been to enable them to hold property and sue and be sued as legal persons, no governmental powers being granted beyond what many of them were already exercising by grant from the crown without being incorporated. Inasmuch as parliamentary representation was one of the rights connected with a municipal borough, the English monarchs granted charters of incorporation with a very free hand, at the same time limiting very narrowly the number of members of each corporation, so that the king would be able to control the municipal elections to Parliament, and thus the Parliament itself. What liberal municipal organizations there were were destroyed in the early part of the reign of the Stuarts by legal proceedings resulting in the forfeiture of the charters in question, after which the king issued new ones restricting the membership in the corporations (7). The result was to produce a form of municipal organization not suited for exercising governmental powers, so that functions which otherwise naturally should have been vested in the municipalities were put in charge of other organizations, especially the parish. At the time America was settled, then, the English municipal corporations had little to do except care for their property, issue local police ordinances, and administer justice in minor matters. This latter power existed because usually the crown appointed the chief city officers as justices of the peace. Other matters affecting the welfare of the city, as well as matters connected with the administra-

(7) Goodnow, Comp. Admin. Law, I, 197.

tion of the central government's powers, were attended to by other bodies.

§ 8. **American municipal corporations: Early history.** The American municipal organization was based very largely upon that of the English municipal borough as described above (8). Nearly all the larger settlements in America were granted special charters of incorporation. A notable exception was Boston, which was for many years governed in the same manner as the smaller rural communities of New England (9). In its general features the early American municipal organization was naturally very similar to that found in the mother country, and the same thing was true of the functions vested in and discharged by the city. The latter were therefore purely local in character, relating to the care and management of the city's property and finances, and the issuing of local police regulations. Some of the chief city officials, following the English precedents, were made justices of the peace and so exercised a limited amount of judicial authority. The affairs connected with the administration of the general colonial government were thus not placed in any way in the hands of the city officials, but were, as in England, carried on by special officers appointed or elected in the same way that similar officers were chosen in the rural communities (10).

§ 9. **Same: Later development.** In the course of the development which has taken place since the separation of the American colonies from the mother country, great

(8) Goodnow, Comp. Admin. Law, I, 199.

(9) Johns Hopkins Univ. Studies in Hist. and Polit. Sci., V, 79.

(10) Goodnow, as above, I, 200.

changes have taken place in the organization of the American city and in the functions which it discharges. In the first place, the central state government, through its legislature, has come to use the city as a convenient organization for the discharge of functions not local in character, but really a part of the administration of the general state government. At the same time the organization has been so changed as to include as members of the corporation the inhabitants of the municipal district incorporated, the qualifications for voters at municipal elections being usually the same as for state elections (11). Even if the city officials as officers of the corporation are not used for purposes of general administration, in many cases locally elected officials, though regarded as legally belonging to a separate corporation, discharge functions clearly connected with the general administration of the central government of the state, the expenses incurred in connection therewith being imposed upon the city. The chief example of this is in connection with the administration of the state school system. The American city, therefore, today is an organization performing two theoretically distinct functions. It is both an organization for the satisfaction of purely local needs which exist because of the density of population in the incorporated area, and also an organ of the central state administration, acting as an agent of the state for the administration of the state laws. The student of the law of municipal corporations must keep this fact clearly in mind if he would find his way through the bewildering maze of judicial decisions dealing with the liabilities of municipal corporations.

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(11) Dillon, Mun. Corp., I, 70.

§ 10. **History of quasi-municipal corporations.** The local administrative system introduced into England by the Norman kings after the Norman conquest was based upon the principle of treating the shire or county as merely an administrative division of the country, at whose head stood the sheriff, appointed and removed by the crown and in charge of all the administrative business of the district (12). These administrative districts were therefore not regarded as corporations or as possessing any powers of their own. While later a more popular character was given to the administrative system of the English county, it remained until very recent times without corporate capacity. Indeed, "it was not until 1888 that the English county . . . really became a corporation" (13). In America the same conception of the county prevailed, and was applied also to the town. These rural governmental organizations, therefore, were regarded simply as administrative divisions of the colony, later the state, and were not thought of as having any peculiarly local functions of their own to discharge. At the present time in nearly all the jurisdictions the rural districts are legally corporations, though possessing rather limited powers, but the historical development has left its traces upon the law and so needs to be taken account of by one who would know why the law stands as it does today.

§ 11. **Same: Local differences in America.** Another bit of history which needs to be taken account of by the

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(12) Stubbs, Constitutional History of England, I, pp. 257-259; 338; 276.

(13) Goodnow, American Administrative Law, 163.

lawyer relates to the differences which existed in different parts of the American colonies with respect to the organization of rural government, differences due to the character of the settlers in the various colonies as well as to the geographical conditions. In New England the chief unit was the town, the county being relatively unimportant. The early settlers in New England were members of religious communities seeking a place where they could enjoy freedom of worship, the Indians were commonly hostile, and the soil and climate were not suited to large plantations. All these things led to the gathering of the population in towns. On the other hand, in the southern part of the country, the settlements were made by persons who had received large grants of land from the English crown, the geographical conditions favored the development of large landed estates, and the Indians were not so hostile as in the north. The result was that the population in the south was distributed among the large plantations, and so the county organizations became of more importance than the town.

§ 12. **Same (Continued).** In the middle states which lay between, a compromise between the two extremes existed, the two rural organizations being both of importance, the emphasis on one or the other increasing according to whether one went north or south. In the state of New York, for example, both town and county were of importance, and the town was of more importance than it was in Pennsylvania, where the county appears to have taken the lead (14). In New England, therefore,

(14) Goodnow, Am. Adm. Law, 183.

many things which in the south were done by the county were attended to by the town, and, in addition, as pointed out above, the town discharged many functions which elsewhere were delegated to the cities. In the south, on the other hand, the chief rural administrative unit was the county. If we bear this in mind, we shall perhaps be able to understand how some of the confusion which exists has crept into our law governing these local areas.

CHAPTER II.

LEGISLATIVE CONTROL OVER PUBLIC CORPORATIONS.

Section 1. General Relation to Legislature.

§ 13. **Consent of inhabitants.** We have seen that originally municipal corporations or boroughs in England were incorporated at their own request and for purely local purposes (§ 5, above). We have also seen that the quasi-municipal corporations were only administrative subdivisions of the state, which of late have been endowed with corporate capacity as a matter of convenience (§§10-12, above). The question arises: Is the consent of the inhabitants of a given district to become a corporation necessary? To settle this we need to bear in mind the fact that, under our system of constitutional government, the legislature of each state is the body in which general legislative power is vested, i. e., the state legislature may do anything provided it be legislative in character, unless it be forbidden by the Constitution of the United States or of the state. As a part of this general power to legislate, it becomes the duty of the legislature to provide, so far as that is not done by the state constitution itself, for the creation, abolition, or alteration of public corporations of all kinds—towns, counties, cities and villages. In performing this function, it is not necessary that the legislature obtain the consent of the inhabitants of the district affected, except in those cases where such consent is required by the state constitution. For example, in Berlin v. Gorham (1) it was held that such consent was not

necessary, although the rule in the case of private corporations is the opposite. In the course of its opinion the court said:

"It was objected that to make an incorporation of a town effectual, there must be a legal town meeting holden in it. This objection rests upon the idea that the rule which applies in the case of private corporations, that the act is ineffectual until it is accepted by the corporators, governs also the case of public corporations, like towns. But there is no such rule in the case of public corporations of a municipal character. The acts of incorporation are imperative upon all who come within their scope. Nothing depends upon consent, unless the act is expressly made conditional. No man who lives within the incorporated district can withdraw from the corporation, unless by a removal from the town; and by the mere passage of the law the town is completely constituted, entitled to the rights and subjected to the duties and burdens of a town, whether the inhabitants are pleased or displeased. The legislature has entire control over municipal corporations, to create, change, or destroy them at pleasure, and they are absolutely created by the act of incorporation, without the acceptance of the people or any act on their part, unless otherwise provided by the act itself."

§ 14. **Same: Constitutional provisions.** It is, however, provided in many of the state constitutions that the consent of the inhabitants of the area affected must be obtained before the incorporation can become effective.

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(1) 34 N. H. 266.

For example, in Massachusetts no town containing less than a given number of inhabitants may be erected into a city "unless it be with the consent and on the application of a majority of the inhabitants of such town present and voting thereon" (2). In the case just cited, the court held that this provision did not apply to the case of the annexation of a town to an already existing city. In discussing the general question involved, the court said:

"The control of the general court over the territorial division of the state into cities, towns and districts, unless controlled by some specific constitutional limitation, must necessarily be supreme. It is incident to that sovereign power which regulates the performance of public and political duties. The rights and franchises of such corporations are granted only to this end, and they may be modified and changed in their territorial limits as public convenience and necessity require. The inhabitants do not derive private or personal rights under the act of incorporation; they acquire no vested right in those forms of municipal government which exist under general laws in towns, as distinguished from those by which the affairs of cities are regulated. If injuriously affected by legislative action upon these political relations, within constitutional limits, the courts can afford no remedy. This power of the general court it was not the intention of the amendment in question to limit or affect. It has no application to the annexation, by the authority of the legislature, of a town or part of a town to a city already existing. It has express reference to the erection of a city

(2) Chandler v. Boston, 112 Mass. 200.

government in the place of a town government within the same town limits. We are referred by the defendants to many acts of the legislature annexing towns and parts of towns to cities, showing that this has been the uniform construction of the article in question."

A very common provision is one prohibiting the alteration, by division, of the boundaries of counties of a certain size without a vote of the inhabitants of the county in favor of the same. Such a provision, for example, exists in Wisconsin (3). It should be noted also that usually today the legislature is forbidden to pass special acts incorporating particular localities by general constitutional provisions which forbid the passing of special acts. The scope of this class of limitations will be discussed later (§§ 27-32).

§ 15. Charter of public corporation not a contract. In the case of Dartmouth College v. Woodward, the Supreme Court of the United States held a charter granted to a private corporation was a contract within the meaning of that clause of the Federal Constitution which forbids the states to impair the obligation of contracts (4). Whatever be the merits of that doctrine, it has no application to the charters granted to public corporations of any kind. For example, in Johnson v. San Diego (5), the legislature divided the city of San Diego in 1889 into two parts, but provided that the part segregated, known as Coronado Beach, should pay its pro rata share of the indebtedness of the original corporation. In 1893 the legislature

(3) Wisconsin Const., Art. XIII, sec. 7.

(4) 4 Wheat. 519.

(5) 109 Calif. 468.

passed a general act regulating the distribution of municipal debts in such cases of division, making the act retroactive so as to cover San Diego and Coronado Beach. This act changed the previous apportionment of the debt, so that Coronado Beach was exempted from all liability for the debt of the original municipality. It was argued that since the original division took place with the consent of the inhabitants of the old city of San Diego, a contract existed that the debt should be apportioned in the manner fixed in the original act. The court decided that no contract existed, and that, in the absence of constitutional limitations restricting the exercise of this right of division, the legislature could do as it pleased. The following passage from the opinion sums up the whole matter in a few words: "This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes, or, as Dillon states it: 'Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded.' "

§ 16. **Same: Rights of legislature distinguished from rights of creditors.** We must, however, be careful to distinguish between two different phases of the problem, viz.: (1) the question whether the municipal charter is a contract with the people of the district; (2) the question of the rights of creditors of the original corporation when the latter is divided or otherwise altered. The answer

to the first of these is that given above—the charter is in no sense a contract between the state and the people of the locality incorporated. In dealing with the second question, however, we must bear in mind the provisions of the United States Constitution respecting private rights of property. It may fairly be asked whether a creditor of a city, who has loaned his money upon the strength of the city's credit, is not deprived of his property without due process of law if the legislature withdraws from the city so large an amount of the taxable property previously within its limits that the remaining portion is not able to pay the debts, unless it permits the bondholders to go against the property of the segregated portion. Again we must subdivide our problem into two parts: (1) If in dividing a municipality the legislative enactment is silent as to the apportionment of the debt, what is the rule for apportioning the same? (2) If the legislature lays down a rule of apportionment, is it constitutional so as to infringe no rights of the creditors of the old municipality?

§ 17. **Legislative apportionment of debt on division of public corporations.** In Laramie County v. Albany Co. (6) the Supreme Court of the United States was called upon to pass upon the first of these two problems. Laramie County, after having incurred a heavy debt, was reduced in area until it occupied something less than one-third of its original territory, other counties being erected out of the portions thus cut off. No provision was made by the legislative enactments for any apportionment of the debt of the old county of Laramie between the new and

(6) 92 U. S. 307.

smaller county of Laramie and the other counties. The new Laramie County paid off the debt and brought suit against the other counties, seeking to recover from the latter their pro rata share of the amount paid. The court decided that where the legislature failed to express the contrary intention, the portion of the old public corporation which still bore the original name was legally the one liable to pay the debts and that no right to contribution existed. Said the court: "Regulation upon the subject may be prescribed by the legislature; but, if they omit to make any provision in that regard, the presumption must be that they did not consider that any legislation in the particular case was necessary. Where the legislature does not prescribe any such regulations, the rule is that the old corporation owns all the public property within her new limits, and is responsible for all debts contracted by her before the act of separation was passed. Old debts she must pay, without any claim for contribution; and the new subdivision has no claim to any portion of the public property except what falls within her boundaries, and to all that the old corporation has no claim." Once more we must be careful to note that this settles only the rights of the inhabitants of the districts concerned among themselves and does not determine the rights of creditors, if the old locality, or what is left of it, is not able to pay the debts. It is clear that so long as the remnant of the old corporation is fairly able to pay, in such a case as the one just considered, the creditor must look to that and cannot proceed against the severed portions.

§ 18. **Same: When creditors are injuriously affected.** If, however, the creditor cannot obtain payment from the

portion which remains with the old name, it seems that he ought to have some remedy against the other portions, and the courts so hold where possible. For example, where a municipal corporation is dissolved and all its territory divided between two other municipal corporations, the Supreme Court of the United States has held that the corporations to which the territory is added become liable pro rata for the debts of the dissolved corporation (7). In another case, the United States circuit court decided that where the legislature cut out from the original city substantially all the taxable property, leaving the creditors with insufficient security for their claims if compelled to look to the balance of the original city for payment, the severed portion would be regarded by the court as substantially the old corporation and liable for its debts (8). In such a case the court goes behind the legislative apportionment in order to prevent the impairment of the obligation of the contract between the creditor and the old corporation. If, however, the legislature simply abolishes the old corporation and puts nothing in its place, it seems that the courts in many cases find it impossible to give creditors who are thereby injured any effective remedy (9). This topic is further treated in the article on Constitutional Law, §§ 233-34, in Volume XII of this work.

§ 19. **Possible basis of right to local self-government.** In the absence of special constitutional provisions, have

(7) Mount Pleasant v. Beckwith, 100 U. S. 514.

(8) Brewis v. Duluth, 3 McCrary (U. S. Circ. Ct.), 219.

(9) Dillon, Municipal Corporations (4th ed.), secs. 169a, 170.

the inhabitants of the various localities a constitutional right to local self-government? It seems not, both upon principle and according to the weight of authority. In the first place, public corporations are organized in pursuance of charters granted by the legislature, either by special or general acts. These acts may be altered, amended or repealed at the will of the legislature, unless some constitutional provision prohibits such action. But, it may be argued, if the legislature allows the public corporations to exist at all, it must permit them to regulate their own local affairs as they please. It is difficult to see why this should be so. Historically, in England the legislature exercised a free hand in this matter; and, as we have already seen, the state legislature in our constitutional system may do any legislative act not forbidden by the constitution. The only possible basis for a denial of the power of the legislature to interfere with the local government of a municipal corporation must, in the absence of an express constitutional provision, rest upon some implied prohibition to be gathered from the fundamental principles of our constitutional system. In spite of the fact that some very eminent authorities have thought that such an implication can be found, the better view seems to be that the courts cannot upset the legislature's enactments upon so vague a principle. It is fundamental in our constitutional system that a court should not hold a legislative enactment to be void because unconstitutional unless it is clearly so; any reasonable doubt should be settled in favor of the legislature. See the article on Constitutional Law, §§ 38-39, in Volume XII of this work. Inasmuch as there is reasonable doubt

whether an implied right to local self-government is to be discovered among the fundamental principles of our state constitutional law, it would seem that the courts ought not to interfere unless they can base their action upon some specific provision of the constitution.

§ 20. **Prevailing view against the right.** One of the early cases dealing with this subject is that of Darlington v. Mayor, etc., of New York (10), decided in 1865. In that case the state legislature provided that whenever any property should be destroyed or injured in consequence of any mob or riot, the city or county in which such property was situated should be liable to an action by the owner for the damages so sustained. In deciding that the statute was constitutional and did not deprive the city of its property without due process of law, as the property was here devoted to a legitimate city purpose, the court used very broad language in describing the power of the legislature over public corporations. The following passage is typical of the attitude of the New York courts: "City corporations are emanations of the supreme law-making power of the state, and they are established for the more convenient government of the people within their limits. In this respect corporations chartered by the crown of England and confirmed at the Revolution stand on the same footing with similar corporations created by the legislature. Their boards of aldermen and councilmen and other officers are as truly public officers as the boards of supervisors or the sheriffs and clerks of counties; and the property entrusted to their care and

(10) 31 N. Y. 164.

management is as essentially public property as that confided to the administration of similar official agencies in counties and towns. In cities, for reasons partly technical and in part founded upon motives of convenience, the title is vested in the corporate body. It is not thereby shielded from the control of the legislature, as the supreme law-making power of the state. Let us suppose the city to be the owner of a parcel of land not adapted to any municipal use, but valuable only for sale to private persons for building purposes or the like. No one, I think, can doubt but what it would be competent for the legislature to direct it to be sold, and the proceeds to be devoted to some municipal or other public purpose within the city, as a courthouse, a hospital, or the like; and yet, if the argument on behalf of the defendants is sound, it would be the taking of private property for public use without compensation, and the act would be void."

This question has most often arisen in those cases in which the legislature has attempted to provide for the appointment by state officials of a board to take over the administration of matters previously attended to by the city, such as fire and police. The view that the legislature has a free hand unless restrained by some constitutional provision is adopted in Redell v. Moores (11). In that case the state legislature provided for the appointment by the governor of the state of a fire and police board for the city of Omaha. The court upheld the constitutionality of the law, overruling a previous decision based upon the other view (12).

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(11) 63 Neb. 219.

(12) State v. Moores, 55 Neb. 480.

§ 21. Contrary view: Cooley's opinion in Detroit cases. In a very celebrated opinion in the case of People v. Hurlbut (13), Judge Cooley, one of the greatest authorities we have ever had upon constitutional law, argued in favor of the view that the local communities have a constitutional right to local self-government. The legislature of Michigan in that case had transferred to a board of public works appointed by the state legislature all the powers, duties, and responsibilities of the former board of water commissioners, the board of sewer commissioners, and some other minor boards, of the city of Detroit. These city boards had previously been chosen locally. In holding the legislative enactment unconstitutional, Judge Cooley used the following language:

"Our constitution assumes the existence of counties and townships and evidently contemplates that the state shall continue to be subdivided as it has hitherto been; but it nowhere expressly provides that every portion of the state shall have county or township organizations. It names officers which are to be chosen for these subdivisions and confers upon the people the right to choose them; but it does not in general define their duties, nor in terms preclude the legislature from establishing new offices, and giving to the incumbents the general management of municipal affairs. If, therefore, no restraints are imposed upon legislative discretion beyond those specifically stated, the township and county government of any portion of the state might be abolished, and the people be subjected to the rule of commissions appointed

(13) 24 Mich. 44.

at the capital. The people of such portion might thus be kept in a state of pupilage and dependence to any extent and for any period of time the state might choose.

"The doctrine that within any general grant of legislative power by the constitution, there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own the legal authority to take away their liberties altogether. If we look into the several state constitutions to see what verbal restrictions have heretofore been placed upon legislative authority in this regard, we shall find them very few and simple. We have taken great pains to surround the life, liberty, and property of the individual with guaranties; but we have not, as a general thing, guarded local government with similar protections. We must assume either an intention that the legislative control should be constant and absolute, or, on the other hand, that there are certain fundamental principles in our general framework of government, which are within the contemplation of the people when they agree upon the written charter, subject to which the delegations of authority to the several departments of government have been made. That this last is the case, appears to me too plain for serious controversy. The implied restrictions upon the power of the legislature, as regards local government, though their

limits may not be so plainly defined as express provisions might have made them, are nevertheless equally imperative in character, and whenever we find ourselves clearly within them, we have no alternative but to bow to their authority. The constitution has been framed with these restrictions in view, and we should fall into the grossest absurdities if we undertook to construe that instrument on a critical examination of the terms employed, while shutting our eyes to all other considerations."

§ 22. **Comment on latter view.** This is perhaps as strong a statement of the doctrine as can be found, but it loses weight when we discover that the Michigan constitution contained a special provision which rendered the law invalid, and so all that is said on the broader question is not in point, and is of value only as expressing the learned writer's opinion. The clause in question provided that "judicial officers of cities and villages shall be elected; and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct." It was conceded by all that elections must be by vote of the people of the locality concerned, and it was a fair inference that appointment meant appointment by some local authority, and not by the central state government. In the Detroit Park cases (14) a legislative enactment which attempted to transfer to a state appointed board the care and management of the park system of Detroit was held unconstitutional. Again, however, the same section of the constitution really forms the basis for the decision. The view contrary to Judge

(14) 28 Mich. 228.

Cooley's finds expression in the recent cases of Van Cleve v. Passaic Valley Commissioners (15) and Newport v. Horton (16).

§ 23. **Legislative control of local matters of state importance.** A full discussion of this question of the right to local self-government requires us to note the distinction which exists between matters of state concern and those of purely local importance. As pointed out in our first chapter (§ 9, above), the city in our system is both an organ for the satisfaction of local needs and an agent aiding in the administration of the affairs of the central state government. Even adopting Cooley's view that there is an inherent right to local self-government, i. e., a constitutional right to have local officials locally elected or appointed, it seems clear that in so far as the state has used the municipality in administering the state's affairs, it may deprive the city of the right to continue to do so, and vest those powers in centrally appointed officers unless some express constitutional provision forbids. That this is the law Judge Cooley recognized himself in the Detroit Park cases cited and discussed above. As we shall see, there are express constitutional provisions which prevent even this to some extent in some states, but of those we shall treat later (§§ 33-37, below). Confining ourselves to the general question at the present moment, it becomes of importance to determine what are matters of purely local importance and what of state concern. We shall have occasion to work the matter out

(15) 71 N. J. L. 182.
(16) 22 R. I. 196.

in considerable detail in discussing the liability of the city for the torts of its officials, and so need only mention here a few of the chief matters which are generally recognized as being primarily of state concern. Chief among such may be mentioned: the preservation of the peace and the enforcement of the criminal law through the police department (17); the protection of the public from disease through the health department; the state school system; the assessment and collection of taxes; and, according to some, the protection of the community from fire through the fire department. Examples of matters primarily of local concern are: sewer systems, park systems, and water, gas, and electric lighting plants, where owned and operated by the city. The leading cases discussing and deciding these questions will be set forth in detail in a later chapter dealing with the liability of public corporations in tort (Chapter III, below).

§ 24. **Control of private municipal property: Trust property.** According to some of the cases, a public corporation may be the owner of property which falls within the provisions of the Fourteenth Amendment to the Constitution of the United States prohibiting the states to "deprive any person of life, liberty, or property without due process of law," which means, among other things, that private property may not be confiscated. All the authorities agree in holding that property vested in a public corporation in trust, to be devoted to charitable purposes of any kind, cannot be diverted to other purposes by legislative enactment (18). Such property, how-

(17) Horton v. Newport, 27 R. I. 283.

(18) Montpelier v. East Montpelier, 29 Vt. 12.

ever, is not, strictly speaking, municipal property; that is, the public corporation does not own the beneficial interest in it. The principle really involved is that the legislature may not deprive the persons beneficially interested, i. e., the class of people for whom the trust was created, of the property in question, for it is well settled that it may deprive the public corporation of the title and vest it in a new trustee or set of trustees (19).

§ 25. **Same: Property held for local purposes.** It should be recalled that earlier in the chapter (§§ 13-15) we have seen that the legislature may, in the absence of some express constitutional provision forbidding it, change the boundaries of public corporations and distribute the public property of the old public corporations among the new corporations formed. In some cases, however, an attempt has been made in these cases of annexation or division of public corporations to distinguish between "public property" and "private property." For example, in Town of Milwaukee v. City of Milwaukee (20), the act whose constitutionality was challenged provided for the annexation of a part of the town of Milwaukee to the city of Milwaukee and that all the property of the town situated in the annexed district should belong to the city. It was decided that the legislature could not constitutionally divest the town of the title to land situated in the annexed district. In doing so the court used the following language:

"The power of the legislature to enlarge the limits of the city of Milwaukee so as to embrace within them the

(19) Philadelphia v. Fox, 64 Pa. St. 169.

(20) 12 Wis. 93.

land in question, and subject it and those who occupied it to the jurisdiction and government of the city, cannot be questioned. All persons residing within the limits of such corporations are obliged to be its members, and to submit to the duties imposed by law. All persons holding or owning property within them are, as to it, bound to the same rule of submission. The difficulty about the question is, to distinguish between the corporation as a civil institution or delegation of merely political power, and as an ideal being endowed with the capacity to acquire and hold property for corporate or other purposes. In its political or governmental capacity it is liable at any time to be changed, modified, or destroyed by the legislature; but in its capacity of owner of property, designed for its own or the exclusive use and benefit of its inhabitants, its vested rights of property are no more the subject of legislative interference or control, without the consent of the corporators, than those of a merely private corporation or person. Its rights of property, once acquired, though designed and used to aid it in the discharge of its duties as a local government, are entirely distinct and separate from its powers as a political or municipal body. It might sell its property, or the same might be lost or destroyed, and yet its powers of government would remain. In its character of a political power or local subdivision of government it is a public corporation, but in its character of owner of property it is a private corporation, possessing the same rights, duties and privileges as any other."

§ 26. Same: **Property held for state purposes.** In another case the same court held that money raised in a

city by taxation for the purpose of erecting a high school could not be diverted by an act of the legislature, without the assent of the city or its inhabitants, to the purchase of a site for a state normal school (21). Among the reasons given for the decision are the ones stated in Milwaukee v. Milwaukee, cited above. According to the court, a high school is a local city institution, but a normal school is a state institution for the benefit of the whole state. While this may be in fact true, it would seem that as a legal proposition the city has no right to continue to control any part of the public school system, if the state wishes to manage it itself. Other courts have accordingly held that municipal property acquired by a city for purposes primarily connected with matters of state administration may be taken from the control of the city and placed under the care of the state authorities (22). In the state of the authorities, therefore, it is difficult to lay down any general propositions which will apply in all the different states, and on principle it seems difficult to assimilate a public corporation to the position of a private person under the Fourteenth Amendment. It would seem better on the whole to rely on the good sense and fairness of the legislature, rather than to attempt to stretch constitutional provisions to cover cases not within the contemplation of their framers.

SECTION 2. EXPRESS CONSTITUTIONAL PROVISIONS.

§ 27. **Prohibition of special legislation.** Aside from the question of the power of the legislature in dealing with public corporations where no express constitutional

(21) State v. Haben, 22 Wis. 660.

(22) Mayor v. Baltimore, 15 Md. 376; People v. Draper, 15 N. Y. 532.

provisions are involved, we find that the interpretation of such express provisions as do exist is by no means free from doubt and difficulty. One of the commonest provisions is that which forbids the legislature to legislate with reference to public corporations by special act. The language of these provisions varies, but the general intent is the same, viz., to compel the legislature to treat alike all public corporations which are similarly situated. In twenty or more states the legislature is forbidden to incorporate cities, and generally also villages, by special act (23). In a few the prohibition covers only public corporations below a certain size. These provisions are generally regarded as including within their meaning acts amending the charters of the corporations referred to, and some of the provisions expressly so state. In a few the prohibition is based upon a general provision forbidding the conferring of corporate powers by special act, the provision being construed by the courts as including municipal as well as private corporations, but not, perhaps, quasi-municipal corporations, although some courts include the latter (24). Other states, and also some of those having the provisions already given, require the legislature in express terms to pass general acts for the incorporation of public corporations. Another provision, usually applying to quasi-municipal corporations only, forbids the legislature to regulate the internal affairs of the localities by special act. It will be seen that these

(23) Goodnow, Municipal Home Rule, Chap. V. The other figures which follow are taken from the same work.

(24) Goodnow, above, 58; Purdy v. People, 4 Hill 384; Beach v. Leahy, 11 Kansas 25; Clegg v. Richardson County, 8 Neb. 178.

provisions do not limit the amount of regulation which the legislature may exercise over public corporations, but simply compel the legislature to exercise its powers by means of general laws applying to all localities similarly situated, rather than by special acts dealing each with a particular city, village, town or county. We need, therefore, first of all, to determine what a special act is, as distinguished from a general act. It seems that hardly any of the constitutions contain any definition of what is meant by special legislation, the New York constitution as revised in 1894 being a notable exception. It is a matter, therefore, for the courts to determine in the exercise of their function of determining the constitutionality of legislative enactments, and we must accordingly turn to the decisions of the courts for light upon the matter. Before doing so, let us notice the New York provision referred to (24a). It defines a special act as an act affecting less than all the cities of one of the classes of cities for which the constitution provides. The constitution in another part divides the cities into several classes, according to their population.

§ 28. **What is a special legislation? Object of prohibition.** In examining the decisions of the courts relating to the definition of special as distinguished from general legislation, we must bear in mind the evil which it was sought to cure. The legislature had in many states fallen into the habit of interfering in the most minute details of the local affairs of cities and other public corporations, and did this by passing special acts, each applying by

(24a) New York Const., Art. XII, sec. 2.

name to one public corporation. Two evils resulted from this: (1) the cities were not permitted to attend to their own purely local concerns; and (2) each public corporation had, or was likely to have, an organization and powers different from those of any other similar municipality, so that it was exceedingly difficult, as a legal proposition, to determine the validity of local action of any kind. To remedy this constant interference in the local affairs of the public corporations, as well as to enable the courts and legal profession generally to ascertain more easily the powers of any given municipality, the provisions we are discussing were adopted into the state constitutions. It is obvious that it could not have been the intention to prevent the legislature from giving to very large cities a different organization from that provided for smaller communities; in other words, the effect of the provisions is to compel the legislature to follow some principle of classification, dealing alike with all public corporations in the same class.

§ 29. **Permissible principles of classification.** The vital question, therefore, is: What principles of classification may the legislature adopt? In a recent case (25) the supreme court of Wisconsin attempts to summarize the results of the cases upon this question. In the case before the court the legislature had provided that "bridges across navigable streams on town roads shall be built, maintained and repaired by the town and village jointly, the expense to be borne by each in proportion to their equalized valuation as fixed by the county board."

(25) Bloomer v. Bloomer, 128 Wis. 297.

This provision required the village of Bloomer in a particular case to pay part of the cost of erecting and maintaining a bridge situated wholly outside the village limits, but within the limits of the town. Among the arguments urged against the validity was that it constituted special legislation. In upholding its constitutionality, the court used the following language: "The classification here seems to satisfy every essential laid down in the books. It is based on substantial distinctions making one class really different from another. It is germane to the purpose of the law. It is not based on existing circumstances only. The law applies equally to the members of the class. The character of the class is so far different from other situations as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good, of substantially different legislative treatment." This recognizes, therefore, that the legislature may classify public corporations, provided the principle of classification adopted is a reasonable one under the circumstances, i. e., is germane to the purpose of the law, and based upon substantial distinctions making one class really different from another; and that a law which applies to all the municipalities falling within any class is general and not special. In the light of this, let us examine some of the cases.

§ 30. **Classification according to population.** It is held, apparently by all courts, that a classification according to population is constitutional, unless it be apparent to the court that the object of the law is to evade the constitutional provision. In the earlier cases the limitation suggested at the close of the preceding sentence was

not clearly made, and led to unfortunate results. The experience of the Ohio courts is especially instructive in this respect. In State v. Pugh (26) the classification was based upon population, with the result that only one city, Columbus, fell into the second class. The law, however, was so drawn that if at any time in the future other cities grew to have the same population, they would become cities of the second class, and the court held the law to be constitutional. This appears to be a rational view, and is what the Wisconsin court had in mind when it said that the classification must not be based upon existing circumstances only, i. e., must be prospective in its operation. If the act applies only to corporations having at the time of the passage of the act a certain population, it is accordingly unconstitutional, no matter how many cities it affects (27). So, also, if the act refers to cities by name and does not make provision for others which later obtain the same population, it is special legislation and void (28). An interesting attempt to evade the provision we are discussing was made in the case of Commonwealth v. Patton (29) in which the provisions of the act applied only to "all counties where there is a population of more than sixty thousand inhabitants, and in which there shall be any city incorporated at the time of the passage of this act, with a population exceeding eight thousand inhabitants, situated at a distance from the county seat of more than twenty-seven miles by the

(26) 43 Ohio St. 98.
(27) McCarthy v. Commonwealth, 110 Pa. St. 243.
(28) City of Council Grove, 20 Kansas 619.
(29) 88 Pa. St. 258.

usually traveled public road." The act was, of course, adjudged unconstitutional, for, as the court pointed out, the legislature might as well have named the county in question. The limitation suggested at the beginning of this paragraph was applied by the Ohio court in the recent case of State v. Jones (30) where the court held void a classification in which the largest eleven cities in the state were put into eleven different classes. Said the court: "In view of the trivial differences in population . . . the present classification cannot be regarded as based upon differences in population." As the Wisconsin court might say, there was no real, substantial distinction between the so-called classes, nor was the basis adopted germane to the purposes of the act.

§ 31. Classification according to geographical conditions. Commonwealth v. Patton (see note 29) is sometimes given as an authority for the proposition that classifications based upon geographical conditions which cannot change are always bad (31). It seems, however, that that is putting the matter too strongly. In this case the geographical elements in the classification furnished no real basis for distinction and were not germane to the purpose of the act. The same may be said of State v. Philbrick (32) in which an act applying exclusively to seaside resorts was held void, but again, as the opinion of the court shows, the basis for the decision is that there is no relation between the objects of the act and the basis of classification. Said the court: "Contiguity to the sea

(30) 66 Ohio St. 453.

(31) Goodnow, Municipal Home Rule, 74.

(32) 50 N. J. L. 581.

is no ground for the existence of a different rule in respect to the general amount of taxes to be raised, and I am clear that no reasons can be suggested why the power to designate the amount should, in boroughs not lying on the ocean, be committed to the people at large, while in boroughs on the sea the power should be placed in the hands of commissioners." In State v. Hammer (33) the court gave as an example of a legitimate classification a law giving to all cities situated on tidewater the privilege of using such water in connection with sewers. It would seem, therefore, that a valid classification may conceivably be based upon permanent geographical features, if the basis of classification is germane to the purposes of the act.

§ 32. **Other methods of classification.** An example of another basis of classification is found in Bronson v. Oberlin (34) in which the act applied to "all villages having within their limits a college or university," and was held constitutional. How easy it is to overstep the limits is shown by a recent Missouri case (35) in which the act of the legislature whose validity was disputed provided that "no dramshop license shall hereafter be granted to any person to keep a dramshop within five miles of any state educational institution which *now* has enrolled fifteen hundred or more students." The act applied only to the state university, and was held unconstitutional. A simple change so that the law would apply to any state educational institution of the size in question

(33) 42 N. J. L. 435.
(34) 41 Ohio St. 476.
(35) State ex. rel. Turner, 210 Mo. 77.

would doubtless cure the defect. On the whole, it seems that these constitutional provisions have not accomplished as much good as was expected from them, as the courts have permitted classifications based upon rather small differences to slip through unchallenged; and on the other hand, they have produced a great deal of litigation and introduced doubt and difficulty into the law. Might it not be better to seek to improve legislatures and depend on their good sense, rather than to attempt to tie the hands of the legislative body in a way which, at the best, must often produce unfortunate and arbitrary results?

§ 33. **Provisions requiring local choice of city officials.** Another common provision found in the various state constitutions is intended to preserve to the localities the right to choose their own local officials (36). These take various forms, sometimes forbidding the legislature to provide by special act for local offices, or for commissions to regulate local affairs, but more commonly, perhaps, conferring upon the people of the locality the right to select all or a part of the local officials. Of the latter, the provisions of the Wisconsin constitution may be taken as an example. That provides that "sheriffs, coroners, registers of deeds, district attorneys, and all other county officers, except judicial officers, shall be chosen by the electors of the respective counties once in two years" (37). It also provides in another section that "all county officers whose election or appointment is not provided for by this constitution shall be elected by the electors

(36) Goodnow, Munic. Home Rule, 60.

(37) Wisconsin Const., Art. VI, sec. 4.

of the respective counties, or appointed by the boards of supervisors or other county authorities, as the legislature shall direct. All city, town, and village officers whose appointment is not provided for by this constitution shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose'' (38).

§ 34. **What are local officials?** Under such provisions it becomes an interesting question as what are local, i. e., city, town, or village officers within the meaning of the constitution. As we saw in the first chapter (§ 9), the legislature has thrown upon the cities of America a constantly increasing amount of state administrative business to attend to, usually leaving the choice of the officials to discharge such functions to the city itself. May the state deprive the city of the right to elect or appoint officials of this kind, or has the city a vested right in the matter? According to the view accepted by the courts in the states having such provisions, the constitution does not intend that the line shall be drawn between officials discharging functions primarily local in character, such as those relating to local public works, and officials attending to matters in which the primary interest is that of the state as a whole. Ignoring any such reasonable basis, the constitution, as interpreted by the courts, provides for an unchangeable organization in which officials who were locally elected or appointed at the time the

(38) Ibid., Art. XIII, sec. 9.

constitutional provision was adopted must continue to be so chosen no matter what functions they discharge; while on the other hand, officials holding positions newly created since the adoption of the provision do not fall within its scope, even if their functions be local in character. For example, although in all other branches of the law the administration of the state's laws through the police is regarded as a state function, it is held that if at the time of the adoption of the provision in question the police were locally chosen, they must continue to be so chosen. This was held where the office in question was that of chief of police (39). The same test had been laid down in many earlier cases, among which we may cite that relating to the office of city attorney (40). This interpretation, whatever be its justification from a legal point of view—and there seems to be much evidence to show that the framers of the provision meant just this—has led to the unfortunate situation that the state is prohibited from itself appointing officers to act in enforcing the state laws within the limits of one of the local areas.

§ 35. **Methods of evading provisions for local choice of officials.** The words "one of" in the last sentence above must, however, be emphasized or a wrong impression will be obtained. To bring this out clearly, let us imagine a state law providing for a state chief of police at the head of a state police force, having jurisdiction throughout the state. Surely no one could contend that the constitutional provision for the local election of local officials would prevent this from being valid. Once grant the

(39) O'Connor v. Fond du Lac, 109 Wis. 253.

(40) State v. Krez, 88 Wis. 135.

constitutionality of such a procedure, however, and it becomes possible to nullify the evil results of the constitutional limitations. For example, in People v. Draper (41) the court sustained as constitutional a law creating a metropolitan police district out of New York county and three adjacent counties, placing at the head of the police of the district a chief appointed by the governor of the state. The same result was reached later in the case of the Metropolitan Board of Health v. Heister (42) in which, as the name indicates, a number of counties were formed into a metropolitan health district. So long as an area having boundaries substantially different from the old public corporation is created the state appointment will be valid, seems to be the view of the New York court. For example, in creating the "Rensselaer police district" the legislature made a slight addition to the area of the city of Rensselaer, but, as the addition was not substantial, the court held the act void (43). This method of evading the constitutional restriction is a favorite one in New York, where the political opposition between the city of New York on the one side and the rest of the state on the other is very pronounced. In order to have a state-appointed supervisor of elections to insure honesty in the count of the ballots at elections of state and national importance, it was necessary for the legislature to create a metropolitan election district differing substantially in area from the city of New York. Any such situation is of course unfortunate, and, as Mr.

(41) 15 N. Y. 532.

(42) 37 N. Y. 661.

(43) People v. Albertson, 55 N. Y. 50.

Goodnow points out, this method of securing home rule for cities by constitutional limitations has largely been a failure (44). The unscientific character of the distinction between local officials who must be locally chosen, and others which need not be, is strikingly brought out by a recent case in Wisconsin. The question was of the validity of the appointment of a "county supervisor of assessment" of taxes in any other way than by election by the electors of the county in question. It will be remembered that the Wisconsin constitution required the local election of "all other county officers" except judicial officers (§ 33, above). The court limited the clause to those county officers whose offices were in existence at the time the provision was adopted, and, as the "county supervisor of assessment" held a newly created office, his office, though it pertained to the county, was not a county office within the meaning of the provision (45).

§ 36. **What are municipal affairs?** A problem very closely connected with that discussed in the preceding paragraph deals with the question of what are municipal as distinguished from state affairs. Upon this question, also, the courts are in conflict, and by the majority of them no scientific view of the matter has been taken. For example, in Commonwealth v. Patton (46) an act which affected the system of judicial administration was held void as violating the constitutional prohibition of special acts relating to the affairs of towns and counties. Surely on any scientific basis the administration of justice is a

(44) Goodnow, Munic. Home Rule, 91.
(45) State v. Samuelson, 131 Wis. 499.
(46) 88 Pa. St. 258.

state and not a local matter. The basis of the view of the courts is, of course, historical, as in the case of local and state officers. Whatever the localities have been in the habit of attending to in the past are local affairs; others are state affairs—seems to be the view of the courts. This, of course, ignores the dual function of the city as an agent for the satisfaction of local needs, and as an agent of the state in the administration of the state's laws. An Illinois case (47) follows the general trend of the New York metropolitan district cases discussed above. An act of the legislature provided for the incorporation of a sanitary district differing in area from any of the ordinary public corporations, and was upheld as not in conflict with the prohibition in the Illinois constitution against the incorporation of cities, towns, and villages by special act. The decision seems inevitable, and yet, as Mr. Goodnow points out, it opens the way to an almost complete nullification of the constitutional restraints (48). A few Ohio cases have clearly adopted as the test of municipal affairs the character of the power in question. Thus it was held that since the enforcement of the criminal law was a matter primarily of state importance, a special act providing for the appointment of a board of police commissioners in a city was not a violation of the provisions of the Ohio constitution forbidding the legislature to confer corporate powers by special act (49).

(47) Wilson v. Board of Trustees, 133 Ill. 443.

(48) Goodnow, Munic. Home Rule, 80.

(49) State v. Covington, 29 Ohio St. 111.

§ 37. **Other constitutional provisions intended to secure municipal home rule.** In a few states, including Missouri, California and Washington, the attempt to secure home rule for the cities has taken the form of a constitutional provision permitting cities of a certain size to frame and amend their own charters, subject of course to the constitution and general laws of the states (50). Of course it will be necessary under such provisions for the court to draw the line between state and municipal affairs, as the constitution obviously is not intended to allow the cities to acquire a vested right in the administration of state matters. In New York a new form of home rule is provided for. After classifying cities according to population, the constitution defines general city laws as those affecting all the cities of one or more classes, and special city laws as those affecting less than all the cities of a class. Special city laws are not prohibited, but every city bill must be transmitted immediately after passage by the legislature to the mayor of the city affected by it, and, after a public hearing, the mayor, or the mayor and the city council concurrently, shall signify their approval or disapproval of the bill in question. If disapproved, the bill must be re-enacted by the legislature if it is to become a law. If the city authorities fail to act within fifteen days after receiving a copy of the bill, it is deemed disapproved (51).

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(50) Goodnow, above, 61.

(51) New York Const., Art. XII, sec. 2.

CHAPTER III.

THE LIABILITY OF PUBLIC CORPORATIONS FOR TORTS.

§ 38. Conflicting principles applicable to the problem. It is a general principle of English and American law that the government cannot be sued without its consent. (See the article on Constitutional Law, § 368, in Volume XII of this work.) Accordingly a state government, unless it consents, is not liable to suits for damages, either for breach of contract or for torts. It is obvious that public corporations, although they are parts of the governmental machine, are not wholly subject to this principle, for one of the objects of creating a corporation is to enable it to sue and be sued as a legal person. This being so, and it accordingly being clear that a public corporation as such is not exempt from suit, the question arises as to the extent of the liability of the corporation, both for breaches of contract and for torts. The contractual liability will be dealt with in Chapter IV, below, and so will be passed over here. Turning our attention, therefore, to the question of tort liability, we need to bear in mind first of all that originally what are now called quasi-municipal corporations were not corporations, and consequently could not be sued at all. For example, in the leading case of Russell v. Men of Devon (1) an action was brought against the inhabitants of the county of Devon in England. It was held that the action could

(1) 2 Term Reps. 667.

not be maintained, as the men of Devon were not a corporation. The same rule originally obtained in America, as is shown by the Ohio case of Hamilton County v. Mighels (2) in which suit was brought against the board of county commissioners for injuries to the plaintiff due to the negligence of the board in maintaining the county courthouse in an unsafe condition, the plaintiff having been injured while attending court as a witness in a law suit. It was held that as the state laws did not make the county or the board of county commissioners a corporation, the suit could not be maintained. "A county," said the court, "is organized most exclusively with a view to the policy of the state at large, for the purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organizations, of the means of travel and transport, and especially of the general administration of justice." Today, however, counties are generally made bodies corporate, with capacity to sue and be sued, so that the former reason for their non-liability has disappeared. The same is true of the town. We shall find, however, that it is still true that these quasi-municipal corporations are, as a rule, not liable for their torts, for the reason that they are still, in spite of the fact of incorporation, chiefly agents employed by the state for state administrative purposes, and so are regarded as entitled to share in the state's immunity from suit. On the other hand, cities and villages have always been corporations, and in spite of that have always been held exempt from suit for

(2) 7 Ohio St. 109.

certain classes of torts, although liable for other classes. In both cases, therefore, liability or non-liability for tort is not based upon the fact that they are or are not corporations, but upon some other principle, which it is now our purpose to discover.

§ 39. **General non-liability of quasi-municipal corporations.** As already suggested, the towns and counties, even though they be incorporated, are still exempt from liability for tort in most cases. For example, in Askew v. Hale County (3) the county, although made a corporation by the state laws, was held exempt from liability in an action brought for injuries to the plaintiff caused by the negligence of the county authorities in failing to keep a bridge in repair. The basis for the exemption, as stated above, is that the county is an involuntary political or civil division of the state, created by statute to aid in the administration of the state government. As such public governmental agency it shares the immunity of the state from liability for torts committed by its agents, even though the latter be acting within the general scope of their authority in carrying on the particular functions which give rise to the injury. The case of Lorillard v. Town of Monroe (4) led to a similar decision in the case of a town. In holding the town exempt from liability, the court describes the town as being only a political subdivision of the state, created in order to aid the state in the more convenient administration of the state's affairs, such as justice, health, poor relief, assessment and collection of taxes, etc. Town assessor and town collector

(3) 54 Ala. 639.
(4) 11 N. Y. 392.

of taxes, therefore, whose acts caused the damage to the plaintiff in the particular case, are agents of the state although chosen by the people of the town, and so the town is not liable for their misdeeds. Here again the defendant town was a corporation with power to sue and be sued. So, also, in the case of Eastman v. Meredith (5) where the plaintiff was injured while attending the town meeting, through the unsafe condition of the town hall, the town, although a corporation, was held not liable for the plaintiff's injuries.

§ 40. **Same: Suggested theories of this.** In many of the cases considerable stress is laid by the court on the fact that counties and towns are *involuntary* territorial and political divisions of the state, while full municipal corporations, i. e., cities and villages, are voluntary organizations. On the basis of this difference, it is suggested that cities and villages are liable in tort because they voluntarily became corporations, while counties and towns are exempt because the opposite is true of them. The trouble with this theory is twofold: (1) Some municipal corporations are involuntary organizations and yet are liable in tort, as we shall see in detail later; and (2) in some cases quasi-municipal corporations become liable in spite of the involuntary character of their creation. The theory, therefore, fails to explain the state of the law and must be discarded. The true test seems to be the one already suggested: wherever the public corporation is transacting state business, it shares the state's exemption from tort liability; where it is attending to

(5) 36 N. H. 284.

what are primarily local matters, it becomes liable. Whether this ought to be the law, need not be here questioned; but that it seems to be the law can be substantiated by an examination of the cases.

§ 41. **Exceptions to non-liability of quasi-municipal corporations.** According to the principle stated above, if the public corporation is carrying on any business except that connected with matters regarded primarily of state importance, it becomes liable for injuries tortiously inflicted upon other persons. Logically, therefore, if a quasi-municipal corporation ceases to be a purely state agent, it should become liable, and the cases indicate that this is the law. For example, in the case of Moulton v. Scarboro (6) the town in carrying on its poor farm undertook to derive a profit from the same, i. e., it went into business to that extent. Incidentally, it owned and kept a ram for the propagation of sheep, and the ram inflicted injuries upon the plaintiff under circumstances such that a private owner would have been liable. It was held that by engaging in a business, it became liable for the negligent management of property used in such business and so liable to the plaintiff. Ordinarily, as we have seen above, the quasi-municipal corporation is not liable for injuries arising from its negligent management of its property, as in the cases of the town hall and county court house already cited and discussed. The principle established by Moulton v. Scarboro has been followed in many other cases which cannot be cited here. In view of the fact that towns and counties ordinarily do little

(6) 71 Me. 267.

that is not, from a local point of view, public, governmental, or state business, the opportunities for applying this principle of liability so as to make the town or county liable are not numerous. The distinction between state matters and those of local importance only becomes, however, exceedingly important in dealing with the liability of cities and villages.

§ 42. **Non-liability of municipal corporations: Acts of police officials.** The application of the principle to cities and villages comes out very clearly in the case of torts committed by peace officers. It should first of all be noted that in all our discussions we assume that the injury to the plaintiff has occurred under circumstances such that a private person would be liable had the same injury been caused to the plaintiff by his servant, i. e., that the ordinary rules as to tort liability have been satisfied, and that the only question is as to the exemption of the public corporation from liability under such circumstances. In Buttrick v. Lowell (7) the plaintiff had been assaulted and battered by two police officers of the city who were arresting him, ostensibly in pursuance of the ordinances of the city, but actually under circumstances not justifying any arrest at all. The court held the city not liable, saying:

"Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature, as a convenient mode of exercising a function of government; but this did not render

(7) 1 Allen (Mass.) 172.

them liable for their unlawful or negligent acts. The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws, and other similar powers and duties with which police officers and constables are intrusted, are derived from the law, and not from the city or town under which they hold their appointment. For the mode in which they exercise their powers and duties the city or town cannot be held liable. Nor does it make any difference that the acts complained of were done in an attempt to enforce an ordinance or by-law of the city. The authority to enact by-laws is delegated to the city by the sovereign power, and the exercise of the authority gives to such enactments the same force and effect as if they had been passed directly by the legislature. They are public laws of a local and limited operation, designed to secure good order and to provide for the welfare and comfort of the inhabitants. In their enforcement, therefore, police officers act in their public capacity, and not as the agents or servants of the city."

A similar case is that of Culver v. Streator (8) in which the plaintiff was negligently shot by a person employed by the city to enforce a city ordinance which forbade unmuzzled dogs to run at large in the city. The court held the city not liable. The interesting thing about both these cases is that the enforcement of the law, be it state law or merely city ordinance, is regarded as a matter public and governmental in character such that the state is interested in it; and the city shares the state's exemption from liability for damage negligently inflicted

(8) 130 Ill. 238.

by its agents while attempting to perform this public duty. Of course the same rule holds for quasi-municipal corporations. For example, in Brown v. Guyandotte (9) a prisoner in the town jail was injured by a fire which occurred in the jail because of the negligence of the town official who was in charge of the same. There was no liability on the part of the town, as the management of a jail is a function connected with the administration of criminal justice.

§ 43. **Same: Acts of health officials.** A similar result is reached in cases dealing with the negligent acts of health officials. In a Michigan case (10) the city board of health allowed a person known to have been exposed to small pox to go at large, and as a result he was received into plaintiff's boarding house, where he became ill with small pox, causing loss and damage to plaintiff. A recovery was denied on the ground that the duty of protecting the public health was a public, governmental and not a corporate or private duty. The following extract from the opinion of the court expresses the gist of the matter so clearly that it deserves quotation:

"The universal rule is that such boards and officers are not acting for private, but for public purposes; they represent the entire state through the municipality, a political division of the state; and municipalities, in the absence of express statutes fixing liability, are not liable for the negligence of such officers and boards. . . . The rule is so clearly stated by Justice Folger in Maxmilian v.

(9) 34 W. Va. 299.

(10) Gilboy v. Detroit, 115 Mich. 121.

Mayor (11) that we quote it: 'There are two kinds of duties which are imposed upon a municipal corporation: one is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private, and is used for private purposes; the latter is public and is used for public purposes. The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for any injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for non-user nor for mis-user by the public agents.' ''

In Maxmilian v. Mayor (11) the plaintiff's intestate was killed by being run over by an ambulance belonging to the city, the driver, whose negligence caused the accident, being appointed by the commissioners of public charities, who in turn were appointed by the mayor. A recovery against the city was denied, on the usual ground.

§ 44. **Same: Fire officials.** Under the same classifica-

(11) 62 N. Y. 160.

tion as police and health fall the officials whose duty it is to protect the safety of the public from fire. Thus in the case of Hayes v. Oshkosh (12) the city, through its fire department, so negligently operated a steam fire engine that property belonging to the plaintiff was set on fire and destroyed. The court held that the city was not liable. The same result was reached in a case in Illinois in which a hook and ladder truck collided with the plaintiff's carriage (13). The same rule, of course, applies where the city fails to provide sufficient water to put out a fire, i. e., to acts of omission as well as of commission (14). It should be noted that the rule of the admiralty or maritime law, as construed by the courts of the United States, often makes a municipal corporation liable under circumstances which, according to the common law, exempt the city from all liability. Thus in Workman v. Mayor of New York (15) the Supreme Court of the United States held that the city was liable for wrongs inflicted by a fire boat owned by and under the direct control of the city fire department, since that department was "an integral branch of local administration and government of the city." The rule seems to be that if the relation of master and servant exists, the owner of the offending vessel is liable for a maritime tort. A discussion of the maritime law, however, is beyond the scope of this article.

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(12) 33 Wis. 314.

(13) Wilcox v. Chicago, 107 Ill. 334.

(14) Tainter v. Worcester, 123 Mass. 311.

(15) 179 U. S. 552.

§ 45. **Same: Further comment and illustration.** The term police must, in connection with this subject, be given a wide meaning. Any official whose duties involve the protection of the peace, safety, or health of the community, is an official, for the result of whose negligent acts the public corporation is not liable. In Mead v. New Haven (16) it appeared that, by virtue of authority given it by its charter, the city of New Haven appointed an inspector of steam boilers, who, while inspecting plaintiff's boiler, negligently subjected it to improper tests and in consequence damaged it. The city was held not liable for the injury. Apparently the care of the poor is in the same category, for in another case the plaintiff's property was destroyed by a fire negligently caused by those in charge of the county poor farm, and the rule of non-liability was applied. Curiously enough, cleaning the street of a city is regarded by the New York courts as a private and local function and for negligence in connection therewith the city is liable (17). In the case as it arose, the plaintiff was injured by the negligent driving of the driver of a street cleaning cart, and the plaintiff was allowed to recover against the city. We, therefore, have the interesting and apparently absurd result that a plaintiff run over by the negligence of the driver of an ambulance cannot recover from the city, but if it be a street cleaning cart, a recovery is allowed. It would seem that cleaning the streets might well be regarded as a public function, connected with the protection of the health of the community.

(16) 40 Conn. 72.

(17) Missano v. Mayor, 160 N. Y. 123.

§ 46. **Non-liability for failure to enact ordinances.** It is one of the functions of municipal corporations to exercise a local power of legislation, i. e., to enact local laws to regulate minor matters upon which the state law is silent and which are better dealt with by local regulations. Such municipal laws are called ordinances, but are as binding upon the public as laws passed by the legislature. It is obvious that the exercise of legislative power must be regarded as public or governmental in character, and accordingly it is held by all the courts that a public corporation is never liable for failing to enact ordinances which it had power to adopt. One of the leading cases is McDade v. Chester (18), in which it appeared that the city council, having power to limit or prohibit the manufacture of fireworks within the city, failed to do so. A fireworks plant was erected and took fire, and plaintiff as a result of the fire was injured. The city was, of course, held not liable. Even though the city once passes an ordinance, it is free to repeal the same without incurring any liability to persons injured as a result of the lack of regulation or prohibition of dangerous businesses. In a Georgia case (19) it appeared that the city of Augusta repealed an ordinance forbidding cattle to run at large in the streets of the city. The plaintiff was a child who, while lawfully in the streets, was gored by a cow which had been turned out to pasture, and the city was held not liable for the injury.

§ 47. **Same: Suspension of ordinances.** In a similar case, the city council suspended for a short time the

(18) 117 Pa. St. 414.

(19) Rivers v. Augusta, 65 Ga. 376.

operation of an ordinance forbidding the use of fireworks in the streets of the city, and during that period the plaintiff's building was destroyed by a fire originating from fireworks discharged by boys in the streets. In holding the city exempt from liability, the court said: "If a court should undertake to say that, by reason of this general grant of power, it was the duty of the municipal authorities of Charlotte to pass and retain in force an ordinance prohibiting the use of fire crackers, etc., and that the city was liable to any person damaged by reason of such omission, there is no reason why the court should not adjudge the city liable in every case where the authorities had omitted to pass any other ordinance, which, in the opinion of the court would have been proper for the good government of the city, or the health or safety of the inhabitants, or of their property. A court assuming to do this would arrogate to itself the legislative power of the city authorities, and it cannot be supposed possible that any court will be guilty of such an usurpation."

§ 48. **Same: Failure to enforce ordinances.** Not only is the city or village exempt from all liability for results flowing from its failure to enact ordinances within its powers, but it is also not responsible for consequences due to a failure on the part of its officers to enforce ordinances which have been passed. Thus in Levy v. New York (20) the city had duly adopted an ordinance forbidding swine to run at large in the city streets. The officers charged with the enforcement of the ordinance in question failed to do so, and plaintiff's son, a boy of eight, was attacked

(20) 1 Sandf. (N. Y.) 465.

and killed by swine which were running at large in the street. The plaintiff sought to hold the city liable for the resulting loss of the son's services, expenses for burial, etc. The court held that the city was neither bound to enact any such ordinance nor to enforce it when enacted. The same principle led to the exemption of the city of Cleveland from liability for the destruction of plaintiff's property by a mob which the city officials made no proper efforts to control (21). In another case the city permitted to remain standing a dangerous wall, which, though situated on private property, was liable to fall into the street. Plaintiff sued for damages due to the death of a daughter killed by the falling of the wall into the street while the daughter was passing. A city ordinance made a wall of this kind a nuisance, but the city officials had permitted it to remain standing for two or three months. Needless to say, the city was held not liable (22).

§ 49. **Licensing a nuisance.** A series of cases has however seriously limited the scope of this rule which relieves the city of responsibility to persons injured by a failure to enforce ordinances. If, instead of merely failing to enforce the ordinance, the city issues what purports to be a permission to someone to do a dangerous thing in a public street or place, the city is, by many courts, held to be responsible for any injuries which result. A leading case is Cohen v. Mayor of New York (23) in which the city granted a license to a grocer to keep his wagon,

(21) Western College v. Cleveland, 12 O. St. 375.

(22) Kiley v. Kansas City, 87 Mo. 103.

(23) 113 N. Y. 532.

when not in use, in the street in front of his store, the thills being held up by strings. A passing wagon struck the grocer's wagon, turned it partly round, and the thills fell and killed a person who was lawfully passing on the sidewalk. The city was held liable, on the ground that it had licensed the maintenance of a nuisance in the street. In a similar case in the same state the city issued a license authorizing the discharge of fireworks in the city streets, and was held liable for damage which resulted therefrom (24). Other cases applying the same rule of liability are Stanley v. Davenport (25) in which the nuisance licensed was a steam motor on a street railway, and Little v. Madison (26) in which the nuisance was a bear show.

§ 50. **Same: Criticism of rule.** It is difficult to find a satisfactory basis on which to place this exception to the rule of non-liability in the performance by the city of police functions. If the city refrained from acting at all, either by not enacting an ordinance or failing to enforce one it had enacted, it would not be liable. It might, therefore, it would seem, forbid all bear shows except on a certain street, and would not be liable for results from a show held on the excepted street; or the city officials might knowingly fail to enforce an ordinance which forbade the bear show, and still the city would be exempt from liability. If, however, the city authority which has the duty of issuing licenses issues an illegal license—for all the cases admit the license of the city cannot legally cover nuisances—then the city becomes

(24) Speir v. Brooklyn, 139 N. Y. 6.
(25) Stanley v. Davenport, 54 Iowa 463.
(26) Little v. Madison, 42 Wis. 643.

liable. A contrary view is maintained in Burford v. Grand Rapids (27), in which the common council of the city set apart certain streets for coasting purposes Judge Cooley, in holding the plaintiff could not recover a judgment against the city for injuries inflicted upon his horse by a coasting party, held that the court could not determine whether coasting on certain streets of a city was or was not a nuisance; that the city council was charged with determining that question, and it having done so, the court would not review its determination. It would seem that the same view would lead to a different decision in the New York, Iowa, and Wisconsin cases cited and discussed above.

§ 51. **Non-liability for school and tax officials.** In carrying on the public school system, the city is regarded as an agent of the state performing a public duty, and accordingly not liable for acts of the school officials which inflict damages on other persons. For example, the janitor of a school building negligently put crude petroleum into a stove in trying to kindle a fire, producing an explosion that injured the plaintiff, a pupil in the school. The plaintiff was denied a recovery (28). In another case the injuries of the plaintiff, for which a recovery was denied, were due to the negligent blasting operations carried on in excavating for a public school (29). A similar rule obtains in reference to tax officials, the function of assessing and collecting taxes being essentially an exercise of sovereign power, and so falling within that class of

(27) 53 Mich. 98.

(28) Ford v. School District, 121 Pa. St. 543.

(29) Howard v. Worcester. 153 Mass. 426.

powers for the negligent exercise of which the municipalities are not liable (30).

§ 52. Liability for streets and highways: Conflicting views. Great confusion and resulting conflict of authority is found in the cases dealing with the liability of public corporations for defective streets and highways, and the subject is one which today is regulated by statute in many, though not in all, jurisdictions. According to Dillon (31) the American states must be grouped into three classes in dealing with this subject, and the cases support him in the statement. In the first class of states, neither municipal nor quasi-municipal corporations are liable for neglect to keep streets or highways in safe condition for the traveling public. This rule obtains chiefly in the New England states (32). In the second group the reverse is the case, both municipal and quasi-municipal corporations being held liable for their negligence in street and highway matters. This view is the prevailing one, perhaps, in the west (33). The third group distinguishes between municipal corporations, i. e., cities and villages, and their streets; and quasi-municipal corporations, i. e., counties and towns, and their highways. According to this view cities and villages are liable for damage flowing from neglect to keep their streets in safe condition, but counties and towns are not liable for similar

(30) Wallace v. Menasha, 48 Wis. 79.

(31) Mun. Corps. (4th ed.), s. 999.

(32) Oliver v. Worcester, 102 Mass. 489; Hyde v. Jamaica, 27 Vt. 443.

(33) Board of Comrs. v. Legg, 93 Ind. 523; Ferguson v. Davis Co., 57 Iowa 601.

negligence in reference to highways and bridges. This rule, for example, prevails in New York (34). It must not be supposed, however, that the states can be grouped geographically in this matter. For example, the middle-western state of Michigan has held that in the absence of a statute, a city is not liable for injuries due to the unsafe conditions of a city street negligently permitted to remain in that condition by the city (35). Judge Cooley dissented in an elaborate opinion, holding that a city or village should be held liable.

§ 53. **Same: Effect of power to control officers.** The Supreme Court of the United States has decided that the District of Columbia is liable for injuries due to the unsafe condition of its streets (36). This case was an interesting one, because the power of appointing and controlling the persons in charge of the streets was vested in officials of the United States government, so that in holding the district liable the court had to lay down the principle that ability to appoint or control the officer in question is not the test of liability for his acts. The Massachusetts supreme court seems in many cases, however, to make much depend upon that question. For example, in one case it says: "The law does not hold parties responsible for the negligence or want of skill of those over whose selection and employment they could exercise no direction or control" (37). In the case in which this language was used, they held a town not liable for injuries

(34) Conrad v. Ithaca, 16 N. Y. 159.
(35) Detroit v. Blackeby, 21 Mich 84.
(36) Barnes v. Dist. of Col., 91 U. S. 540.
(37) Walcott v. Swampscott, 1 Allen (Mass.) 101.

caused plaintiff by a collision due to the negligence of a driver employed by the town highway surveyors in repairing the highway.

§ 54. **Same: Distinction between city and country roads.** The distinction drawn by the third group of states, between city streets and county highways, may not at first sight be obvious, but appears to be valid. City streets are chiefly convenient means of getting about from place to place in the city, i. e., they are maintained by the city primarily for local purposes. County highways, on the other hand, are means of intercommunication between the different portions of the state, and so are maintained by the counties and towns as agents of the state. This distinction is borne out by the recent good roads movement in New York, Wisconsin, and other states, in which the state is aiding in a financial way the rural corporations in constructing roads. No one thinks of having the state defray the expenses of paving city streets, in whole or in part.

§ 55. **Liability for negligent conduct of public work.** The public works of a municipal government are as a rule carried on for purely local purposes and the city, if our principle be logically applied, should be liable for negligence in connection with the same. This seems to be the law. In Bailey v. Mayor (38) the plaintiff was injured by the negligent and unskilful construction of the Croton dam, a part of the work undertaken by the city of New York to secure a water supply. The city was held liable, and this result was reached even though

(38) 3 Hill (N. Y.) 531.

the commissioners who had charge of the work were appointed by the governor and senate of the state. The duties, said the court in substance, are corporate and local; not state and governmental. The power to carry on the enterprise was granted for the local advantage of the inhabitants of the city.

§ 56. **Same: Effect of deriving revenue therefrom.** In many cases emphasis is laid by the courts in their opinions on the fact that the city derives a revenue from the public work in question. For example, in Aldrich v. Tripp (39), in which a city street was rendered unsafe by a stream of water thrown across it from a city hydrant, the city was held liable for resulting injuries, stress being laid upon the fact that the city derived a revenue from the water rentals. That it is not the revenue feature which determines the liability, however, seems clear when we examine the cases relating to the negligent construction or management of sewer systems, from which the city derives no revenue. In Murphy v. Lowell (40) the injury to the plaintiff was caused by the negligent manner in which a blast was fired by workmen constructing a sewer. The city was held liable. The rule may well be that, in the case of property primarily used for state or governmental purposes, the city is liable if it derives a revenue from the same, otherwise not; but in the case of property used primarily for private and municipal purposes, it seems the city is liable whether revenue is derived from the same or not. In a few jurisdictions, however, the same distinction is taken in dealing with

(39) 11 R. I. 141.

(40) Rome v. City of Worcester, 124 Mass. 564.

these cases that we have noticed elsewhere, viz., liability is made to turn very largely upon the question of control and whether the municipality voluntarily undertook the work in question. For example, in a recent Massachusetts case (41) the state law required the city of Worcester to build a certain sewer, and the court held the city exempt from liability for negligence in connection with the same.

§ 57. Negligence in management of municipal property. Closely connected with the questions discussed in the preceding paragraph, indeed inseparable from them, is the question of the liability of the public corporation for negligent management of its property. At the outset we must draw a distinction between injuries which occur because of the negligence of the municipality in failing to keep its property in a safe condition, and injuries which arise from what may be called, for want of a better term, the active negligence of the corporation or its agents in using the property. A failure to observe the distinction has led some courts astray, as we shall see. The distinction suggested is based upon the ordinary law of torts, which exacts from the owner or occupier of property a duty to use reasonable skill and care to keep his premises in a reasonably safe condition; if he does not and a person who is on the premises is injured because of the unsafe condition, he may recover from the owner or occupier. This right is limited, however, to persons described in the law of torts as "invited persons" as distinguished from trespassers or mere licensees. The real question for us is: Does this rule apply to public

(41) 188 Mass. 307.

corporations? We have already seen that it does not apply to quasi-municipal corporations which are using the property for public purposes simply, such as county courthouses, jails, etc. According to the weight of authority, also, as we have also seen, the same rule of exemption applies to a municipal corporation in dealing with property devoted to public, governmental purposes.

§ 58. **Same: Effect of deriving revenue therefrom.** In both cases, however, if the public corporation derives a revenue from the property, it has ceased to use it for purely governmental purposes and becomes liable for injuries resulting from the unsafe condition of the premises. In Worden v. New Bedford (42) the city had let the city hall for a rental to be used for a private exhibition, and was held liable for injuries which plaintiff received by falling through a trap door which had been negligently left in an unsafe condition. In this class of cases, it seems that it is immaterial who created the unsafe condition; the question is, did the owner or occupier use reasonable skill and care to keep the premises in safe condition? If reasonable care would have prevented the accident, the city is liable even though someone not connected with the city created originally the unsafe condition. The rule of non-liability of the city if the property be devoted to a public purpose and no revenue be derived from the same was enforced in Hill v. Boston (43), in which a child attending one of the Boston public schools was injured because of the unsafe condition of the stair case of the school building.

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(42) 131 Mass. 23.

(43) 122 Mass. 344.

§ 59. Same: Attempt to create more extended liability. In some recent cases the attempt has been made to extend to municipal corporations the ordinary tort rule and to make the city liable for all injuries to invited persons which result from a negligent failure to keep municipal property of any kind in a safe condition. For example, in Bowden v. Kansas City (44) the plaintiff, an employee of the fire department, was injured because of the negligence of the city authorities in failing to keep the fire station in reasonably safe condition, and was permitted to recover. A similar result was reached in the Wisconsin case of Mulcairns v. Janesville (45) in which a cistern which was being constructed for the use of the fire department of the city was negligently allowed to remain in an unsafe condition and the plaintiff was injured in consequence thereof. A recovery was allowed. So also in Galvin v. Mayor of New York (46) a recovery was permitted for injuries due to the unsafe condition of the county courthouse. It is not possible to reconcile such cases with other cases, often in the same jurisdiction, denying a recovery. For example, in Wisconsin the court denied that any liability existed on the part of a city for injuries arising from the unsafe condition of a school building, on the usual ground that in maintaining a school the city was acting in a purely public governmental capacity and as an agent of the state (47).

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(44) 69 Kansas 587.

(45) 67 Wis. 24.

(46) 112 N. Y. 223.

(47) Folk v. Milwaukee, 108 Wis. 359.

§ 60. **Same: Comment and criticism.** On the whole, it seems that only a few courts have adopted the rule which makes cities liable irrespective of the purposes for which the property is used, and that in most jurisdictions it is still true that if it be used for purely governmental purposes and no revenue be derived from the same, the city is not liable. The whole question is reviewed and discussed in the recent case of Mains v. Fort Fairfield (48) in which the municipality was exempted from suit for injuries resulting from the unhealthful condition of the jail. Even if the rule of the more extended liability be adopted, the decision of the supreme court of Washington in the case of Cunningham v. Seattle (49) cannot be supported. Here the city was held liable for the trespass on the plaintiff's land of a horse which was negligently allowed to escape from the fire station. The injury was not due in any way to any unsafe condition of city property, but only to the active trespass of the horse. In other words, the court failed to notice the distinction above pointed out, between active torts and the failure to exercise care to keep property in one's control in reasonably safe condition. The wider rule of liability was intended to cover only the latter case.

§ 61. **Liability for physical invasion of another's property.** A number of cases which have been supposed to adopt the wider rule of liability for the negligent management of city property discussed above, really are to be referred to another principle. It is fundamental in our constitutional system that private property is not to be

(48) 99 Maine 177.
(49) 40 Wash. 59.

taken for public purposes without just compensation. That being so, it is clear that if the public corporation occupies my premises with a physical structure, it is to that extent taking my property, and must pay me for it. Upon some such an idea as this are based decisions in cases like that of Miles v. Worcester (50) in which the city erected the wall of its high school on the plaintiff's land. To deny a recovery on the ground that the city, in managing the school, was a public agent, would be to permit a taking of the plaintiff's property without compensation, and accordingly a recovery ought to be and is permitted. In another case the city negligently constructed a privy upon school property so that the plaintiff's cellar was flooded with sewage, and a recovery was properly allowed (51). It would seem that decisions of this kind cannot determine the rule of liability where the plaintiff is injured while on city property because of the unsafe condition of the latter.

§ 62. **Failure to provide adequate public works.** Great confusion exists in the cases dealing with this subject; and again this is due, in part at least, to a failure on the part of many judges to distinguish between what are really different situations. Obviously it would not do to hold public corporations liable for failing to exercise all their powers to provide public works, if the injury to the plaintiff was one which would have resulted even if the municipality had not acted at all. We have seen above that for a failure to exercise its ordinance power the municipal corporation is never liable, and the same reason

(50) 154 Mass. 511.

(51) Briegel v. Philadelphia, 135 Pa. St. 451.

exempts the corporation for injuries resulting from the failure to supply public works. Such a case is that of Mills v. Brooklyn (52) in which the plaintiff's property was flooded with surface water, the city sewer and drainage system being insufficient to carry it off. Clearly, if the city had never had any sewer system at all, the same or a worse injury would have taken place, and accordingly the city should not be liable. The decision was, therefore, in favor of the city.

§ 63. **Affirmative damage caused by defective public works.** It is a different matter, however, if the city plans a public work, carries it out, and so changes the situation that damage is caused which would not otherwise have been inflicted on the plaintiff. For example, in Seifert v. Brooklyn (53) the city planned a sewer which did not have sufficient capacity to carry the sewage, the result being that sewage came up through the manholes of the sewer and flooded plaintiff's property. The city was very properly held liable. The difference is between omitting to prevent injury to plaintiff in the first case, and actively causing injury to the plaintiff in the second. This very obvious distinction has not been kept in mind, and a general statement that a city is not liable merely because it failed to adopt a plan for adequate public works, true enough when applied to proper cases, has been used to deny liability when the city has acted in constructing a public work so as to damage the plaintiff in a way in which he would not have been injured if the city had not acted. For ex-

(52) 32 N. Y. 489.

(53) 101 N. Y. 136.

ample, in Johnston v. District of Columbia (54) foul water from a sewer escaped into plaintiff's land, because of the inadequacy of the original plan in failing to provide for a sewer of sufficient capacity to carry the water and sewage. A recovery was denied, on the ground that the municipality was vested with a discretion in providing public works and the court could not undertake to supervise their exercise of that discretion. The result of such a decision is that if an inadequate plan for a sewer is adopted and injury results, even from a physical invasion of plaintiff's premises, the city is not liable, but if an adequate plan is adopted and defectively executed, the city is liable if the same kind of an injury results. This is hardly a satisfactory result, and the better view seems to be that taken in other cases, that, for acts of commission such as this, the city is liable, even if the injury result from a defective plan. It is assumed, of course, that in all these cases the public work is of a private and local character, and not purely public and governmental. As previously stated, the cases are conflicting in their decisions upon these questions and it is difficult to state the law with any degree of accuracy. In Detroit v. Beckman (55) the injury complained of resulted from the adoption by the city of a defective plan for a culvert, the plaintiff driving off the end of the culvert into a ditch. The city was held not liable, on the ground that the adoption of a plan was legislative in character and its adequacy could not be reviewed by the court. The same court, however, holds the city liable if the act results in a physi-

(54) 118 U. S. 19.
(55) 34 Mich. 125.

cal invasion of another's property, as in Ashley v. Port Huron (56); but it seems that the rule ought to be that if the city creates a dangerous situation which did not previously exist and injury results from that, it should be responsible therefor. That was the view taken in Gould v. Topeka (56a) in which the injury for which plaintiff recovered resulted from being thrown over the side of an embankment built by the city without any railing or lights, the original plan calling for none. The tendency of the later cases seems to be in the direction of compelling the city to adopt a reasonably safe plan as well as to execute it without negligence after it has adopted it (57), though many still follow the older rule (58).

§ 64. Liability of public corporations in tort for ultra vires acts. Since a corporation of any kind is not a natural person, the law has always had considerable difficulty in dealing with the question of the responsibility of the artificial legal person for acts done in its name by its members or officers. On the one hand it is urged that since the corporation is only an artificial and not a natural person, it can do only those things it is authorized to do; on the other, it is argued that in reality the law simply treats the group of persons who are members of the corporation as one person for convenience, and that the group really constitute the corporation. Space fails us to go into this discussion, and we must content ourselves with noticing that today private corporations are held to a very wide responsibility in tort, even for acts involv-

(56) 35 Mich. 296.

(56a) 32 Kans. 485; 49 Am. Rep. 496.

(57) North Vernon v. Voegler, 103 Ind. 314.

(58) Keeley v. Portland, 100 Me. 260.

ing malice, such as malicious prosecution. In dealing with public corporations, in addition to the difficulties arising in connection with private corporations, we have the additional fact to deal with that usually the members of the corporation, the voters, do not authorize the doing of particular things, as do the stockholders of a private corporation at the stockholders' meeting, but merely elect representatives who do all that is done in the name of the city (59). The usual problem is whether the city or other public corporation is liable for wrongful acts committed by their representatives in conection with undertakings not authorized by the charter of the corporation. To begin with, it is clear that all torts are in a sense ultra vires, i. e., beyond the powers of the corporation. It is clear, however, that any sensible system of law must hold the corporation responsible for injuries wrongfully inflicted on other persons by their representatives who are engaged in carrying on undertakings which are duly authorized by the charter and are of a private and corporate character. In fact, we have up to this point assumed that to be the rule, and the discussion in the preceding sections shows that it is. The real difficulty begins when the officials of the city or other public corporation undertake a work not authorized by the charter and in carrying it on injure some one. In the space at our command we cannot go fully into a discussion of the cases dealing with this subject. If any general rule can be formulated, it amounts very nearly to this: If the work undertaken and in the course of which the injury occurs be within the

(59) The introduction of the initiative and referendum will, of course, change this in many cases.

general scope of the authority conferred by the charter upon the municipality and the officers concerned, although actually in excess of those powers, the city is liable; but if the undertaking be wholly beyond the powers of the municipality and its officers, no liability rests upon the corporation.

§ 65. **Same: Illustrations of non-liability.** Perhaps the distinction intended to be drawn will appear with sufficient clearness from the following cases. In Anthony v. Adams (60) the selectmen of a town caused a dam to be erected, in such a manner that plaintiff's land was flooded. The town had under no circumstances any authority to erect a structure of this kind, and the plaintiff was therefore denied a recovery. Similarly, in Albany v. Cunliff (61) the authorities of the city of Albany assumed to build a private bridge across a basin to a pier in the Hudson river. The only authority to do this was contained in an unconstitutional statute, which was, of course, no authority whatever. Owing to the improper and negligent construction of the bridge by the city's officers, the bridge fell and plaintiff was injured. As the undertaking was wholly beyond the city's powers, judgment was given for the defendant city. In another case the city council called a meeting for political and philanthropic purposes, and through the negligent management of the meeting by the city officers, an injury resulted to a person present. The city was held not liable, the calling of such a meeting being wholly beyond the city council's power (62). The

(60) 1 Metc. (Mass.) 284.

(61) 2 N. Y. 165.

(62) Boyland v. New York, 1 Sandf. (N. Y.) 27.

same result was reached where the city charter forbade the laying out of a street so that it would run over any site of any building the expense of removing which would be more than $100. The city officers who had charge of laying out streets violated this provision, and the land owner concerned sued the city, but failed to recover. It is possible to criticize this case on the ground that the laying out of the street was within the general powers of the city officers, though in excess of them (63).

§ 66. **Same: Illustrations of liability.** This brings us to a discussion of cases in which the city is held liable. In Norton v. New Bedford (64) the city was constructing a sewer, acting through the officers who had charge of sewer construction. Being sued for injuries caused by negligence of those in charge, it defended on the ground that the construction of the sewer was illegal and without authority of law, because of certain irregularities in the proceedings of the city board which had authorized the building of the sewer. This was held to be no defence, the undertaking being within the general scope of the powers of the city, though in excess of them in the particular case. In a similar case in Wisconsin a town was held liable for defects in a bridge erected by the officers of the town in pursuance of a vote of the electors, although the erection of the particular bridge under the circumstances was illegal (65). In another case the village of Saratoga Springs, N. Y., constructed a sewer in part through private lands. It being doubtful whether the

(63) Dillon, Mun. Corps. (4th ed.), sec. 970.

(64) 166 Mass. 48.

(65) Houfe v. Fulton, 34 Wis. 608.

village had any power to construct sewers elsewhere than in the street, the village sought to escape liability for sewage cast upon plaintiff's land because of faulty construction of the sewer, but was held liable (66). Here, again, the village clearly had general power to build sewers, but construction of the particular sewer was actually illegal, and beyond their powers. This distinction is a nice one, difficult of application, and many conflicting decisions can be found in the books.

(66) Stoddard v. Saratoga Springs, 127 N. Y. 261.

CHAPTER IV.

THE POWER OF PUBLIC CORPORATIONS TO MAKE CONTRACTS.

§ 67. **Fundamental rule of construction of municipal powers.** The following statement by Dillon in his classic treatise on the law of Municipal Corporations is one which has been quoted with approval by courts of last resort in nearly all jurisdictions: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation —not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void" (1). It is remarkable with what unanimity the courts have adopted this statement and acted upon

(1) Dillon (4th ed.), sec. 89.

it in hundreds of cases. In discussing, therefore, the power of a municipal corporation to make contracts, we must from the outset keep in mind that it is an authority of enumerated powers and that the tendency of the courts is to follow this rule of rather narrow construction of corporate powers. In only a few cases is there exhibited a tendency to break away from this rule and give public corporations a liberal interpretation of their charter powers.

§ 68. **Implied power to contract on credit: For specific purposes.** According to the statement quoted in the preceding paragraph, a municipal corporation has powers necessarily or fairly implied in or incident to powers expressly granted. Let us examine some illustrations of the application of this principle. In Ketchum v. Buffalo (2) taxpayers of the city sought an injunction to prevent the levy of a tax to raise money to pay interest on bonds running twenty-five years, issued for the purchase of lands for market grounds. Under the city charter the city had power to purchase land for such purposes, the only question being whether a power to purchase on credit and issue bonds for the same could be fairly implied. The decision was in favor of such a power on the part of the city, the court saying: "No less than the authorities to which I have referred forbid that it should be held that a corporation may not incur a debt in the exercise of its appropriate powers, or may not purchase upon credit property which is required for purposes authorized by its charter. . . .

(2) 14 N. Y. 356.

The affairs of no municipal corporation were ever conducted, I presume, without incurring obligations for various purposes, in anticipation of its revenues. It may be held that there is a distinction between incurring debts for the ordinary and current expenses of the corporation, to be defrayed by the expected annual income, and debts upon an extended credit for objects of a permanent character, as, for instance, that a debt may be created for the repair of a bridge or market, but not for the erection of or procuring a suitable site for such market. I am unable to discover any solid basis for such a distinction, or any definite line by which it could be marked."

§ 69. **Same: For general purposes.** In this case the city borrowed the money for a specific purpose. May it borrow money generally, i. e., without specifying for what particular purpose? That question was raised and answered in Mills v. Gleason (3), in which the action was brought to restrain the treasurer of Dane County from selling lands of the plaintiff for taxes assessed for the purpose of raising a sum to be paid as interest on a loan of $100,000 previously obtained by the city of Madison and for which bonds had been issued by the city. The money was obtained for no specific purpose, but had been paid into the city treasury and expended in erecting city buildings and for general city purposes. The court sustained the validity of the bonds, and held that in such cases it was not necessary to show that the money had been properly used by the city, although it had been so

(3) 11 Wis. 470.

used in the case before it. Upon this point, however, there is a conflict of authority, and perhaps the larger number of cases hold that the municipal corporation has no implied power to borrow money generally, or to meet the current expenses of city government, although it may borrow for permanent improvements, as in the case of Ketchum v. Buffalo discussed above. For example, in Hackettstown v. Swackhamer (4) the note whose validity was challenged was given by the treasurer of the town, in the name of the town, for money borrowed to meet the ordinary expenses of the town. The loan was held invalid, on the ground that such a power was not necessary or even to be fairly implied from the powers granted by the charter. The court relied, in part, on the fact that the charter expressly authorized the town to raise money from year to year by tax, in order to meet current expenses, holding that the grant of this power expressly, by implication denied the power to borrow to meet the same expenses. Judge Dillon is inclined to think that the majority of the cases deny even the implied power to borrow money to make future local improvements, even though such improvements be expressly authorized (5). The obvious result of such narrow rules of construction has made it necessary for the legislature to go into great detail in enumerating the powers of local corporations in their charters.

§ 70. **Implied power to issue negotiable bonds when expressly authorized to borrow money.** As a result of the

(4) 37 N. J. L. 191.

(5) Dillon, Mun. Corps. (4th ed.) sec. 125.

narrow construction of the city's powers to borrow money, many charters now expressly grant municipalities the power to borrow money. Does this express power carry with it an implied power to issue negotiable bonds for the loan? The question is an important one, for it is one of the characteristics of negotiable instruments that certain defenses which would render the instruments unenforceable in the hands of the original holders are lost if they pass into the hands of persons to whom they are transferred for value, before maturity, without notice of such defenses. The Supreme Court of the United States in the case of Brenham v. Bank (6) held that such a power was not one fairly to be implied as incidental to the express power to borrow money. Three of the nine members of the court, however, dissented from the conclusions of the court, and pointed out that Judge Dillon agreed with their view rather than with that of the majority. Judge Dillon's statement is as follows: "Express power to borrow money, perhaps in all cases, but especially if conferred to effect objects for which large or unusual sums are required, as for example subscriptions to aid railways and other public improvements, will ordinarily be taken, if there be nothing in the legislation to negative the inference, to include the power (the same as if conferred upon a corporation organized for pecuniary profit) to issue negotiable paper with all the incidents of negotiability." It would seem that the view of the minority of the United States court represents not only the better view, but also the weight of authority.

(6) 144 U. S. 173.

§ 71. **Constitutional restrictions on power to incur indebtedness.** Perhaps the reluctance of the courts to imply broad financial powers on behalf of the local corporations is justified by experience, which shows that many of them when granted the wider powers promptly exercised them to so great extent as to become bankrupt. Because of this it is not uncommon to find in the state constitutions limitations forbidding the local corporations to borrow beyond certain limits, usually a fixed percentage of their assessed valuation. As usual, these constitutional limitations have given rise to much litigation. In Valparaiso v. Gardner (7) taxpayers sought an injunction to stop the letting of a contract to a waterworks company for the supply of water for twenty years at $6,000 a year. The municipal corporation had no money in the treasury at the time and had reached the limit set by the constitution to its indebtedness. The constitutional provision in question provided that "no political or municipal corporation in this state shall ever become indebted, in any manner or for any purpose, to an amount in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void." The court decided that as the water rent would only become due in annual instalments, at the end of each annual period, it did not constitute an indebtedness within the meaning of the constitution. It was an obligation but not a debt.

(7) 97 Ind. 1.

§ 72. **Same (continued).** On the other hand, in the case of Spilman v. Parkersburg (8) the court held the obligation incurred was a debt. The facts were that the city, being indebted up to the constitutional limit, entered into a contract which purported to be a lease of an electric lighting plant, paying so much per year, but with an option to buy the plant at the end of the period for $1; plainly, said the court, a contract of purchase, creating a debt for the whole sum due in instalments. The distinction between this and the preceding case seems to be that in the former the article, water, was to be furnished from year to year, and the debt accrued only as the water was received; while here the whole debt accrued at once. From these two cases it is obvious that the interpretation of these apparently plain constitutional provisions is not so simple as at first sight seems to be the case. A full discussion would occupy more space than is at our command, and we must content ourselves with noticing that some courts hold that the limitation does not apply to indebtedness incurred for expenses imposed upon quasi-municipal corporations by state law, but only to indebtedness voluntarily incurred by the county or town (9), while others adopt the contrary view (10). Perhaps a slight difference in the wording of the constitutional provisions may explain some of the apparent conflict. It is also possible for a city to escape the constitutional provision by providing for assessing the cost of local improvements upon

(8) 35 W. Va. 605.

(9) Rauch v. Chapman, 16 Wash. 568.

(10) Barnard v. Knox Co., 105 Mo. 382.

abutting property, so drawing the contracts that no liability to pay rests upon the city (11).

§ 73. **Rights of holders in due course of negotiable bonds: Recitals.** In those cases in which municipal corporations have been given power to issue negotiable bonds, it is difficult to determine the question of the rights of holders of the same who have purchased them in good faith, for value, and without notice that certain formalities required by law have not been satisfied. Very often the law requires that the voters of the locality sanction the issue by a majority vote. If this is not done, may a holder in due course, i. e., a transferee for value without notice of the fact that no vote was had, enforce the bonds? It is clear that if the bonds as issued contain no recitals as to the statute under which they are issued, or as to the prior votes or proceedings of the voters, no recovery can be had, even by a holder in due course (12). Where, however, the officers whose duty it is to ascertain whether all conditions required by statute have been complied with, insert in the bonds a recital that they have, e. g., that the election was duly held and a majority vote given sanctioning their issue, it is held that a holder in due course may recover (13). The idea back of this is that the legislature must intend the officials to announce the result and that other persons may rely upon their statements—clearly a fair rule. In the case cited the court put it as follows: "Where legislative authority has been given to a municipality, or to its officers, to subscribe for the stock of a

(11) Davis v. Des Moines, 71 Iowa 500.

(12) Marsh v. Fulton Co., 10 Wall. 676.

(13) Coloma v. Eaves, 92 U. S. 484.

railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."

§ 74. **Same: Public records.** The limitations on this doctrine are clearly set forth by Mr. Justice Gray of the United States Supreme Court in the case of Sutliff v. Lake County Commissioners (14): "In those cases in which this court has held a municipal corporation to be estopped by recitals in its bonds to assert that they were issued in excess of the limit imposed by the constitution or statutes of the state, the statutes, as construed by the court, left it to the officers issuing the bonds to determine whether the fact existed which constituted the statutory or constitutional condition precedent, and did not require those facts to be made a matter of public record. But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one, there can be no implication that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds."

(14) 147 U. S. 230.

In other words, it must appear that the recitals relied upon must be made by officers whose duty it was, under the statute authorizing the issue of the bonds, to ascertain and determine whether all conditions were complied with, "not merely for themselves, as the ground of their own action, in issuing the bonds, but, equally, as authentic and final evidence of their existence for the information and action of all others dealing with them in reference to it" (15). In the case from which the foregoing extract is taken, the court concluded that the holder in due course of the bonds in question could not recover, as the recitals were not of the required character.

§ 75. **Right to recover from a public corporation in quasi-contract.** The principles of the law relating to quasi-contracts are treated in the article on that subject in Volume I of this work. As pointed out there, the basis of the liability is the fundamental principle that no person shall unjustly enrich himself at another's expense. This principle, of course, may be applied to corporations, private and public, as well as to natural persons. For example, one who paid money to a city for invalid bonds was permitted, on returning the bonds, to recover, not on the contract contained in the bonds, but on a quasi-contractual duty to restore the amount paid (16). The bonds were invalid because not having been registered with a state official, but the city officials concealed this by antedating them so that they appeared to have been issued before the act requiring registration went into effect

(15) Harlan, J., in Bank of Toledo v. Porter Township, 110 U. S. 608.

(16) City of Louisiana v. Wood, 102 U. S. 294.

However, a recovery in quasi-contract will be denied if to permit it will result in destroying the effect of limitations placed upon the powers of a municipal corporation to protect the taxpayers from what is popularly known as "graft." In McDonald v. Mayor of New York (17) the charter of the city required contracts for the purchase of supplies above a certain amount to be let to the lowest bidder—obviously to protect the public from the payment of exorbitant prices. The plaintiff furnished supplies to the city in virtue of an agreement not made in accordance with the charter provision. He could not, of course, recover on the contract, as that was clearly void; but sought to reach the same result by relying on the fact that the city had had and used the supplies, and should pay for them, at least, their reasonable value. A recovery was denied, the court saying that all who dealt with the city must at their peril ascertain the limitations contained in the city charter, and that to permit any recovery at all would nullify the limitation in question.

(17) 68 N. Y. 23; 23 Am. Rep. 144.

PUBLIC OFFICERS

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INTRODUCTION.

§ 1. **Administrative Law.** Administrative Law in its broad signification includes the great mass of public or governmental law not included in international or constitutional law or the penal codes. It is readily distinguishable from international law, and, although many of its rules have penal sanctions, it is not likely to be confused with the fairly well defined body of rules intended to pro-

tect persons and property included in the penal codes. The line of separation from constitutional law, however, is less marked and indeed it may be said that most of the constitutional law that finds its way into the courts except such as concerns the division of powers between the state and Federal governments is likely to be treated under Administrative Law. But, although their fields overlap, there is much that is not common to them. Constitutional law deals with the organization of the state in its most solemn form as a constitution-making body, organizes and determines the functions of the legislature, the executive, and the judiciary, divides fundamental powers between the state and Federal governments, and enumerates fundamental private rights. Administrative law organizes the central administration and the organs of local government, specifies in detail the rights and duties of the great army of governmental employes all over the country, deals with the methods of administrative action and control, and finally provides remedies against the government and its officials for the violation of private rights. This is an immense field. It includes most of the law on the statute books, the law of taxation, sanitary and quarantine legislation, highway, railway, postal and telegraph legislation, the poor laws, the school laws, in fact laws on all the widely varied subjects of governmental activity. It is clear that this is a great branch of the law, rivaling, if not exceeding in extent, the private law as to persons and property, the consideration of which takes so much of the time of the courts. It would be matter for an encyclopedia, not for a single treatise. Accordingly

in single treatises on administrative law the treatment of the subject has been much narrowed.

§ 2. **Ordinary treatment of subject.** The idea of writers of single treatises on administrative law has been to give at a glance a picture of the vast machinery of government administration in its working operation. Other than taking a sweeping glance at the directions of governmental activity, with their varied functions and methods of action, they have confined themselves to the organization of the central administration and of local government; to the commencement and termination of the official relation, with the more general rights and duties of officers; to a cursory examination of the methods of administrative action; and finally to a more detailed examination of the methods of control over the administration.

§ 3. **Treatment in this work.** But even much of what is given in these single treatises, although helpful in giving an adequate idea of the working of the administration as a whole, belongs rather to the pages of a work on civil government than to a general treatment dealing with the law of the courts. Accordingly, the organization of the central administration and of local governments, the legislative control over the administration, and the varied lines of government activity will not be considered here. What remains may be conveniently classified under the head of Public Officers and of Extraordinary Remedies, and will be treated in this article and the one following.

CHAPTER I.

NATURE OF PUBLIC OFFICE. ELIGIBILITY.

SECTION 1. NATURE OF PUBLIC OFFICE.

§ 4. **Not contractual.** The official relation is not based on contract and therefore a state officer holding an office for a term of years is not protected in the continuance of his office or its emoluments by the clause of the United States Constitution which declares that "no state shall pass any law impairing the obligation of contracts." Thus in Butler v. Pennsylvania (1) a statute of Pennsylvania had provided that canal commissioners be appointed annually at a compensation of four dollars a day, but before Butler's year had expired a second statute was passed fixing the termination of the office at an earlier date and lowering the compensation for the shortened term to three dollars per day. This was claimed by Butler to violate the above clause of the Federal Constitution, but the Supreme Court of the United States held that while the promised compensation for services already rendered might be rightly claimed, a right to continue services no longer desired would be detrimental to progress and the public good, and that, if the legislature could change the duties of the office alone and not the salaries as well, "the government would have to become one great pension establishment on which to quarter a host of

(1) 10 Howard, 402.

sinecures." Following the above case it has likewise been held that the right to an office is not "property" within the meaning of the Fourteenth Amendment, which declares that no state shall "deprive any person of life, liberty, or property without due process of law" (2). In the Federal Constitution it is provided that the compensation of judges shall not be diminished during their continuance in office, and the salaries of other officers as well are protected in many of the state constitutions (3), but these provisions do not give the holders contractual rights to the offices or vested rights of property in them.

§ 5. **Distinguished from an employment.** But there are many persons in the service of the state who are called employes rather than officers. They are usually of the humbler ranks and little difficulty is apt to be experienced in identifying them. Where the employment is of a more important nature, however, the line between employment and office is often hard to draw and yet it often must be drawn, as employments, unlike offices, are contractual and thus enjoy the protection of the United States Constitution. Thus, in the case of Hall v. Wisconsin (4), Hall and two others had by act of the legislature been appointed "commissioners" to make a survey of the state. Their duties were specifically defined in the act, and they were required to distribute the work among themselves by agreement and to employ such assistants as a majority of them might deem necessary. In case of a vacancy occurring in the commission, the governor was

(2) Taylor v. Beckham, 178 U. S. 548.

(3) Stimson, Federal and State Constitutions, p. 208.

(4) 103 U. S. 5.

empowered to fill it and was authorized to remove any member for incompetency or neglect of duty. Further the act required the governor "to make a written contract with each commissioner" for the performance of his allotted work, "fixing the compensation therefor, which was not to exceed two thousand dollars per annum and was to be paid for only such part of the year as each commissioner should actually work. An appropriation of $6,000 per annum for six years was made to be paid to the persons entitled to receive the same." By an act passed three years later Hall was made head of the commission, was vested with the general supervision and control of the survey, and was required to contract with the other commissioners to finish their surveys within the year. Two years later both acts were repealed without qualification. Hall's contract with the governor was entered into about a year after the passage of the first act and had about a year to run at the time of the repeal. The United States Supreme Court held that Hall's relation to the state was contractual and not official, that the statute under which the governor had acted had referred to a "contract," that the instrument executed in accordance with this law was an "agreement" and not a commission, that the duties of the commissioners and their compensation were fixed by the agreement, in accordance with the statute, and that the agreement was signed and sealed and attested as in other cases of contract. Furthermore no bond was required as is usually the case with officers, and Hall was not a citizen of Wisconsin, which was one of the qualifications for holding office in that state.

§ 6. **Created by law.** It seems to be a fundamental assumption in our scheme of government that offices shall be "established by law" (5) and not by executive act. In the case of United States v. Maurice (6), the United States attempted to recover certain moneys received by Maurice from the sureties on his bond given for the faithful performance by him of the duties pertaining to the office of agent of fortifications. The sureties claimed that there was no such office and that therefore the bond was void. Chief Justice Marshall admitted the contention that, unless otherwise specifically provided, the Constitution of the United States required that offices should be established by law, but held that under the circumstances of the case that requirement had been met. From 1794 to 1808 Congress had passed several acts empowering the President to erect fortifications and making appropriations therefor, but organizing no system for their execution. In the army regulations of September, 1816, provision was made for the appointment of an agent of fortifications and his duties were defined. These army regulations were the work of the war office, but Chief Justice Marshall found that they had received the sanction of acts of Congress of 1816 and 1821 and so, although with some hesitation, decided that they had been "established by law."

§ 7. **Duration.** In the above case it was said: "Although an office is an 'employment,' it does not follow that every employment is an office. A man may certainly

(5) U. S. Const., Art. II, sec. 2, § 2.

(6) 2 Brock. 96.

be employed under a contract, express or implied, to do an act or perform a service, without becoming an officer. But, if a duty be a continuing one which is defined by rules prescribed by the government and not by contract, which an individual is appointed by the government to perform, who enters on the duties appertaining to his station without any contract defining them; if those duties continue, though the person be changed, it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an officer." It has been held that commissioners for a particular act or purpose are not officers (7) but there is not entire agreement on this point.

§ 8. **Duties.** Office is often defined as a duty or trust, and in a Pennsylvania case it was held that to take away the powers and jurisdiction of a judge was virtually to abolish the office. "It seems like a solecism to regard that to be an office, to which there are no duties assigned" (8).

§ 9. **Name and emoluments.** In the early definitions of offices, the right to take the fees and emoluments occupies an important place. This is natural in view of the character of private property which many offices hold in other countries, but, as that character is lacking in this country, more recent American definitions say little of emoluments but much of duties. Nor need an office have a name, although it usually has. "The official or unofficial character of the defendants is to be determined, not

(7) Matter of Hatheway, 71 N. Y. 268.

(8) Commonwealth v. Gamble, 62 Pa. St. 349.

by their name, nor by the presence or absence of an official designation, but by the nature of the functions devolved upon them''(9).

Section 2. Eligibility to Office.

§ 10. **When qualifications must exist.** The question frequently arises whether qualifications for office must exist at the time of election or appointment, as well as at the time of taking office. In the case of Taylor v. Sullivan (10) Sullivan had received a majority of votes for county attorney, but had never declared his intention to become a citizen of the United States until after election, notwithstanding that citizenship or a declaration of intention to become a citizen was a qualification for holding office. His contention was that, although a necessary qualification for holding office, it was not necessary to an election. The court, however, referred to Webster's dictionary in which ''eligible'' is defined as ''proper to be chosen; qualified to be elected,'' and showed its common derivation with ''electable,'' the meaning of which, the court said, was more obvious but not different. This case is in accord with the majority rule, although in a number of states it has been held that the qualifications need exist only at the commencement of the term of office.

§ 11. **Citizenship and residence.** It is a common provision that an officer must be a citizen or have declared his intention to become such, or else these qualifications may follow from a requirement that he be a voter. Residence within the state for a certain period is also commonly re-

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(9) State v. Kennon, 7 Ohio St. 557.

(10) 45 Minn. 309.

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quired and often residence within the official district, especially in the case of city officers.

§ 12. **Age.** Statutory provision is usually made excluding those under age from holding office, and for the more important offices the constitutions frequently require a greater age than a bare majority. At the common law it would seem that one under age could hold a ministerial office, but not one requiring the exercise of discretion, and it has been held that in the absence of statute a minor can hold such an office as that of notary.

§ 13. **Sex.** The common provision that only voters shall be eligible to office excludes women from office where male suffrage prevails. By the common law it would seem that women were generally ineligible to office except that of queen, unless the duties of the office could be performed by a deputy. The tendency at the present time, however, is to extend their right to hold offices, especially those of a local nature; and the less important offices in the Federal government, such as postmaster and pension agent, have frequently been held by women.

§ 14. **Property.** Property qualifications, although common in England and of frequent occurrence in the earlier history of this country, are now uncommon here. A number of constitutions forbid them altogether, but where there are no constitutional restrictions they are occasionally to be found. Thus in the case of State v. McAllister (11) it was urged that the section in the state constitution providing that no person except a citizen entitled to vote should be elected or appointed to any office,

(11) 38 W. Va. 485.

by implication prevented the legislature from requiring councilmen to be freeholders, but the court held that the section in question merely restricted officeholders to a certain class and did not in any way prevent the legislature from requiring other qualifications as well.

§ 15. **Religious or political belief.** Most of the constitutions forbid "tests" for the holding of office, and these have been construed to forbid political or religious qualifications. The attempt to secure the nonpartisan character of certain boards has given rise to the interesting cases of Attorney General v. Board of Councilmen (12) and Rogers v. Buffalo (13). In the first case a law of Michigan had provided for the appointment of a board of commissioners of registration and election, two members whereof were to be from each of the two leading political parties in the city. The court held that the effect of the statute was to make party adhesion a condition of office and that, if obeyed, it would put all but the two favored parties beyond the possibility of representation, and accordingly held it unconstitutional. In the second case the civil service law of New York provided for the appointment of three persons as civil service commissioners, not more than two of whom should be adherents of the same party. The attempt was made to apply the reasoning of the preceding case on the ground that, after two appointments were made from one party, the political faith of members of the same party would prevent their appointment to the third office, but the court

(12) 58 Mich. 213.
(13) 123 N. Y. 173.

held, as long as there was no discrimination against those not party members, nor against any party, and all within the same party were treated alike, that the statute could not be considered to impose a political test and was constitutional.

§ 16. **Crime.** A common punishment for crime is disqualification for office and in a Pennsylvania case (14) it was held that the article of the Pennsylvania Constitution providing that a candidate for office "guilty" of bribery, fraud, or wilful violation of any election law should be forever disqualified from office, did not require a conviction by regular criminal proceedings to work the disqualification, but that the fact of guilt could be determined in a quo warranto proceeding to try the title to the office. Bad character alone is not sufficient to disqualify one for office, although the civil service laws very generally make provision against the appointment of persons who habitually use intoxicating liquors to excess or are guilty of notoriously disgraceful or infamous conduct and often provide for a certificate of good moral character (15).

§ 17. **Holding other office.** Where two offices exist under the same government and are incompatible, the holding of the first does not usually render the holder ineligible to the second, but the acceptance of the second vacates the first. Incompatible offices are therefore properly treated elsewhere (§§ 67-68, below). But where the law provides, for instance, that one person shall not hold more than one lucrative office and a person

(14) Commonwealth v. Walter, 83 Pa. St. 105.

(15) Goodnow, Administrative Law of United States, 263.

already holds a lucrative office under another government, the law cannot operate on the first office and, to be given effect, must act as a disqualification for the second office. Thus it is often the case that the holding of a Federal office will render the holder ineligible to state office. It is also frequently provided that members of a legislature shall be ineligible to hold an office created or the emoluments whereof have been increased during the term for which they shall have been elected. Nor may an officer appoint himself to office. Thus in the case of People v. Thomas (16) the law devolved upon three justices of the peace the power of making an appointment to the office of supervisor and they proceeded to do so by appointing one of their own number, but the court said: "These three justices are the depositories of a public trust, and it is a principle of universal application, as well as of public decency, that neither of them should be permitted to discharge it for his own benefit or to promote his private interest," and so held the appointment invalid.

§ 18. **Civil service requirements.** Educational requirements such as the ability to read and write are sometimes requirements for the holding of office, and in the case of offices such as that of judge or engineer, professional or technical training and experience are common qualifications. The most important intellectual requirements, however, are those of the civil service. The act of Congress of 1883 has been the model of much of the state legislation. The President may require the taking of examinations by applicants for almost any position in the serv-

(16) 33 Barbour (N. Y.) 287.

ice of the government except laborers, and the rules laid down by him have gradually been extended so that there are now over 120,000 positions subject thereto. There are three general classes of examinations, those designed to test merely the general intelligence and adaptability of the competitors; those designed to test, in addition, the technical training of the applicants, as in the case of stenographers, draftsmen, etc.; and those designed to test technical skill, as in the case of mechanics, but without tests of an intellectual character. Neither the application nor the certificate required of the candidate shall contain any information with regard to his religious belief or political affiliations and, unless honorably discharged from the military or naval service of the United States, every applicant must be within the age limitations fixed for the positon desired. If the position belongs to one of the recognized mechanical trades, he must show that he has worked as apprentice or journeyman for such period as the commission may prescribe. The commission may refuse to examine or certify those physically unfit for the particular service, or who have been guilty of a crime or infamous or notorious and disgraceful conduct, or who have been dismissed from the service for delinquency or misconduct within one year preceding the date of the application, or who have intentionally made false statements as to any material fact, or been guilty of any deception or fraud in securing registration or appointment. Except in certain cases where extremely technical qualifications are required, a registration list is kept on which are placed the names of those attaining an average of seventy, in the order of their averages, except that those

honorably discharged from the army and navy need attain only an average of sixty-five and are given preference. The method of procedure is for the appointing officer to request the commission to certify to him the names of those eligible for the position, whereupon the commission certifies the three names at the head of the list unless they have been already certified three times to the same department or office. The person appointed is on probation for six months, when if satisfactory, his appointment becomes absolute (17).

§ 19. **Same: Remedies thereunder.** What remedies an applicant for a position in the Federal government would have in case his name were not certified by the civil service commission, or in the case of a veteran if it were not given preference, or what rights a person appointed contrary to the civil service rules would have as to salary, etc., has not received much attention at the hands of the United States courts but the decisions of the state courts on civil service legislation are numerous. Thus, in New York it has been held that the courts have a right to determine whether the exemption of certain classes from examination is within the constitutional provision that fitness for appointment shall be ascertained by examination where practicable (18), that an officer appointed in violation of the civil service law could not recover the salary attached to the position (19), and that a veteran may by mandamus compel a civil service commission to give his name the preference on the registration list required

(17) See Goodnow, Admin. Law of U. S., 264-281.

(18) Hale v. Worstell, 185 N. Y. 247.

(19) People v. Roberts, 148 N. Y. 360.

by law (20). It has been held unconstitutional, however, to give veterans a preference without undergoing any of the tests required of others (21), or to deprive the appointing officer of all power of selection by limiting his choice to the highest on the list when his power of appointment is constitutional and not statutory (§ 34, below).

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(20) People v. Civil Service Board, 5 App. Div. 164

(21) Brown v. Russell, 166 Mass. 14.

CHAPTER II.

SELECTION, INSTALLATION AND TENURE OF OFFICERS.

Section 1. Election.

§ 20. **Registration.** The right of suffrage is one of those fundamental rights dealt with in most constitutions so that comparatively little power is left with the legislatures with regard to it. Purity of election laws are within their proper province, but great care must be exercised in drafting these in order not to violate constitutional rights. Thus in the case of Attorney General v. Common Council (1) the Michigan statute required that boards of registration sit on the four days commencing with the first Monday of October and the fourth Monday of October, and that no ballots should be received by the inspectors under any pretense whatever unless the person offering to vote had been registered. The court pointed out that in October, 1888, the fourth Monday had been the 22d, while the general election day had been November 6, leaving fourteen full days between the last day of registration and election, whereas the constitutional requirement for residence in the township or ward was only ten days. Furthermore there was no provision for the registration of persons sick or absent on the day of registration. The court said: "The object of a registry law, or

(1) 78 Mich. 545.

of any law to preserve the purity of the ballot-box and to guard against the abuses of the elective franchise, is not to prevent any qualified elector from voting, or unnecessarily to hinder or impair his privilege. It is for the purpose of preventing fraudulent voting. In order to prevent fraud at the ballot-box, it is proper and legal that all needful rules and regulations be made to that end, but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a larger number of legal voters from exercising their franchise." Accordingly the law was declared unconstitutional. Similar decisions have been made in other states where the effect of requiring a prior registration has been to exclude voters otherwise qualified, but there is also authority of weight on the other side.

§ 21. **Secret ballot.** At the present time some form of the Australian ballot is in use in almost every state of the Union, in Canada, England and even on the Continent. Its cardinal features are two: "First, an arrangement for polling by which compulsory secrecy of voting is secured; second, an official ballot containing the names of all candidates, printed and distributed under state or municipal authority" (2). Its great object has been the securing of secrecy in voting, the avoidance of coercion and bribery, and thus the free expression of the voter's will. Opportunity must be given to vote for names not on the official ballot, but this must not be taken advantage of to make distinguishing marks which shall render the ballot capable of identification. Thus in a Connecticut

(2) Wigmore, Australian Ballot System (2nd ed.), p. 50.

case (3) it was held that the fact that fourteen ballots had pasters written in ink in the same hand, but with a different name on each paster, pasted over the name of a certain candidate, was a suspicious circumstance, justifying, in the absence of explanation, the rejection of the ballots as if designed for the purpose of identification. Most of the cases where the courts have rejected the ballots because of distinguishing marks have been cases where there was something irregular in the cross marked opposite the name of the candidate. Sometimes this is made on the wrong side of the candidate's name, sometimes just outside the square, and sometimes in some form other than the cross generally prescribed. The folding of the ballots in an unusual and striking manner also invalidates the ballot.

§ 22. **Limited voting.** The desirability of the representation of the minority has led to various schemes to bring it about. One of these, that of limited voting, was before the supreme court of Pennsylvania in Commonwealth v. Reeder (4). A statute of that state, in providing for the election of seven judges of the superior court, had declared that no elector might vote at any election for more than six of them; and it was claimed, in accordance with a previous Ohio decision, that this violated the constitutional provision that a duly qualified elector should "be entitled to vote at all elections," but the court said that no sound reason had been urged in the argument why they should enlarge the scope of these words by prac-

(3) State v. Walsh, 62 Conn. 260.

(4) 171 Pa. St. 505.

tically adding "also for every candidate of a group of candidates for the same office."

§ 23. **Cumulative voting.** Another scheme for minority representation was approved in Illinois (5). An act of that state had provided that, in the election of trustees of the sanitary districts organized under it, each qualified voter might vote for as many candidates as there were trustees to be elected, or he might distribute the vote among not less than five-ninths of the candidates to be elected, giving each of the candidates among whom he distributed the same the same number of votes or fractional votes. The court could find no constitutional objection to legislation prescribing a method of voting of this kind and so came to an opposite conclusion from that reached by the supreme court of Michigan (6) at almost the same time. The Michigan court could point to no clause of the constitution which the scheme violated, and the decision is rather an instance of the freedom with which acts of the legislature have sometimes been declared unconstitutional in that state than a precedent to be followed.

§ 24. **Vote necessary to a choice.** The general rule is that the votes of a plurality of those voting is necessary to an election. In the case of People v. Clute (7), the defendant had received the greater number of votes for the office of superintendent of the poor, but at the time of the election he was supervisor of the town and so ineligible to election. The other candidate, Furman, who had received

(5) People v. Nelson, 133 Ill. 565.

(6) Maynard v. Board, 84 Mich. 228.

(7) 50 N. Y. 451.

a minority of the votes, claimed to be elected. The court said: "It is the theory and general practice of our government that the candidate who has but a minority of the legal votes cast does not become a duly elected officer. But it is also the theory and practice of our government that a minority of the whole body of qualified citizens may elect to an office, when a majority of that body refuse or decline to vote for anyone for that office. Those of them who are absent from the polls, in theory and practical result, are assumed to assent to the action of those who go on to the polls; those who go to the polls, and who do not vote for any candidate for office, are bound by the result of the action of those who do; and those who go to the polls and who vote for a person for office, if for any valid reason their votes are as if no votes, they are also bound by the result of the action of those whose votes are valid and of effect. As if, in voting for an office to which one only can be elected, two are voted for, and their names appear together on the ballot, the ballot so far is lost. The votes are as if for a dead man or for no man. They are thrown away; and those who cast them are to be held as intending to throw them away, and not to vote for any person capable of the office. And then he who receives the highest number of earnest valid ballots is the one chosen to the office. We may go a step further. They who, knowing a person is ineligible to office by reason of any disqualification, persistently give their ballots for him, do throw away their votes, and are to be held as meaning not to vote for anyone for that office." But in this case the court said that there was no proof of actual notice of Clute's ineligibility, nor of any facts from which notice

could be implied, save that he was a supervisor; and that to hold Furman elected it would have to be presumed, "as a matter of law, that nearly three hundred of those who voted for Clute had knowledge of the fact that he was supervisor; knowledge of the existence of the act of 1853; knew that, the fact and the law concurring thus, he was ineligible to receive and avail himself of their votes in his favor; and knew that their votes given to him were wasted, without effect upon the count." The court refused to make these presumptions and denied Furman's right to the office.

§ 25. **Compliance with statutory regulations.** It is not always the case that failure to comply with a statutory provision will invalidate a vote. Thus in the case of Boyd v. Mills (8) it was provided by law that "the ballots shall be on plain white paper through which the printing or writing cannot be read." The law also provided for sample ballots of some color other than white for the inspection of the candidates and their agents. In a certain township the election officials used the sample instead of official ballots and it was claimed that all the votes so cast should be disregarded, but the court held that the departure from the law in matters which the legislature had not declared of vital importance would have to be substantial in order to vitiate the ballots, that if only a part of the ballots used had been colored, they might on that account have been capable of identification and invalid, but that as all of the ballots were of the same color they were not subject to this objection and could not de-

(8) 53 Kan. 594.

feat the prime object of the law, the secrecy of the ballot.

§ 26. **Recognition of political parties on official ballots.** For many years political parties were entirely voluntary associations unknown to the law. The general adoption of the official ballot, however, compelled the recognition of parties by the officers charged with making up the ballots, and has resulted in many cases in the courts passing on the regularity of party nominations. The awkwardness of the position of the judges in deciding these cases will be seen from a controversy that arose in New York. In 1891 Hugh H. Woodworth and others brought an action to compel the clerk of Seneca county to print their names as the regular nominees of the Republican party on the ballots to be used at an approaching election. At the regular county convention the uncontested delegations from six out of ten towns were evenly divided between the Mongin and Patterson factions. The control of the convention, therefore, was to be determined by the regularity of the delegations from the remaining four towns. The county committee, with the exception of one member, was composed of persons in sympathy with the Mongin faction. They decided to recognize the Mongin delegates from three towns and to divide one delegation between the two factions. This program was carried through despite the protests of the Patterson faction, which then withdrew and organized another convention. This body was composed of at least thirty delegates who were fairly elected, while the other contained at most twenty whose election could be claimed as valid, and so the court recognized its nominees as regular and granted

the order asked for (9), which was approved on appeal (10).

§ 26a. **Same: Effect of decisions of party organizations.** Two years later, however, in a subsequent election, a similar application was made to the same judge by a nominee of the Patterson faction. In the meantime every state convention, and every judicial, congressional and senatorial convention of the district in which Seneca county was situated, which had been held since the prior adjudication, had recognized the Mongin faction, and the Mongin county committee had been made custodian of the funds distributed by the state committee. Justice Adams said: "I still think, as already stated, that the title to regularity of the Patterson faction was pretty clearly established upon the original hearing, and that it would, in view of the provision of the statute which authorizes this proceeding, have been no more than courteous for the party conventions to have adopted the decision of the general term, which was deliberately made after a careful and impartial hearing, but there is no way in which they can be compelled to do so; and consequently it seems to me that the only rule for courts and judges to adopt in this and all other similar contests is that they will interfere only in cases where there has been no adjudication of the question of regularity by some division of the party which is conceded to be superior in point of authority to the one in which the contention arose, provided, of course, that the question of good faith in the making of such adjudication is not involved. The adoption of a dif-

(9) In re Woodworth, 16 N. Y. Supp. 147.

(10) 19 N. Y. Supp. 525.

ferent rule will inevitably tend to bring party organizations and the courts into unseemly conflicts over questions which are peculiarly within the cognizance of the former tribunals, a result which most certainly ought, if possible, to be avoided'' (11). This view was afterwards upheld by the court of appeals (12). When a similar question came before the supreme court of Michigan in 1898 it refused to decide between the contending factions and ordered both names to be placed on the ballot under the party name (13). Where the statutes expressly require the courts to pass on the right to a place on the ballot, however, the courts cannot escape the responsibility, however unpleasant it may be.

§ 27. **Nominating petitions.** Practical convenience makes it impossible that every combination of persons calling itself a political party should receive recognition as such on the official ballot. Accordingly provision is made that unless the party received a small (usually from one to five) per cent of the votes cast at the preceding election, it must present a petition signed by a small per cent of the qualified voters to entitle it to a place on the ballot. The names on the official ballot will thus be limited to the nominations of the regular parties and to those presenting proper petitions, but as long as the voter is not prevented from inserting on the ballot the name of anyone he chooses his constitutional rights are not impaired thereby (14).

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(11) In re Pollard, 25 N. Y. Supp. 385.

(12) In re Fairchild, 151 N. Y. 359.

(13) Stephenson v. Board of Election Commissioners, 118 Mich. 396.

(14) State v. Black, 54 N. J. L. 446.

§ 28. **Primary laws.** The early primary laws did little more than subject primaries to much the same rules as the general elections. Thus the New York law of 1882 merely declared certain acts committed at primaries crimes, such as the false personation of a voter, intentionally voting without right, prevention of others from voting, fraudulent concealment or destruction of ballots; required that officers at such elections take the usual oath of inspectors at general elections; and provided for the challenge of voters and the administration of an oath to a person so challenged. These laws proving inadequate, many of the states have proceeded to the regulation of nominations and party control in considerable detail. One of the steps taken has been to determine who shall vote at party primaries.

§ 29. **Open and closed primaries.** An Oregon act of 1901 provided for a closed primary; that is, confined the voting at a party primary to party members, and prescribed as a test of party membership that the elector "voted for a majority of the candidates of such party or association at the last election, or intends to do so at the next election." The constitutionality of this provision was questioned in Ladd v. Holmes (15), but the court said that if the test were a reasonable regulation by which to ascertain party affiliation, it lay within the power of the legislature and accordingly held the law constitutional. The open primary, in which any elector is allowed to vote irrespective of party affiliations, was provided for by a California statute, but it was declared unconstitutional.

(15) 40 Ore. 167.

Speaking of it the court said: "It provides that the primary elections of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations, past, present, or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly—and not in violation of any law, but in strict accordance with the law—names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not, whether he ever intends to become such a member or not. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members and turned over to the venal and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men authorized by this law to represent it and place upon the general election ballot as its candidates those whom they might select—a body of men whose sole purpose might be the disruption and destruction of the party whose representatives this law declared them to be" (16).

§ 30. **Direct primaries.** In a large number of states there has been an attempt to remedy the evils of party government by the direct primary. An instance of advanced legislation of this kind is that of Minnesota. Places on the official ballot are given only to those nominated at a direct primary or presenting a petition signed by the requisite number of voters. At the time the voter

(16) Britton v. Board of Comrs., 129 Cal. 337.

presents himself for registration he is given a primary ballot. He is not permitted to participate in the elections of more than one party, but which it shall be is for him to determine. Provision is further made that any one who desires to be a candidate at a primary may file a statement to that effect, together with a sum of money proportionate to the importance of the office. Persons receiving the highest number of votes from the members of a particular party are entitled to a place on the official ballot at the election, which takes place within a reasonable time (17).

§ 31. **Regulation of party organizations.** In other states the old system of nomination by convention has not been interfered with, but the party organizations have been subjected to considerable control. In the New York act of 1898 it was provided that each party should have a general committee for each county, and that membership in this committee was to be gained only through the suffrages of the members of the party exercised at the annual primary elections on the annual primary day and at public expense. In the case of People v. Democratic Committee (18) one Coffey had been elected a member of the Democratic general committee of Kings county at a primary election held in September, 1899, and had duly qualified by paying the prescribed fees; but at a meeting of the committee held March 23, 1900, he was, by resolution, expelled for alleged disloyalty and open hostility to the Democratic party and was thereafter barred from exercising the

(17) Goodnow, Admin. Law of U. S., 249.

(18) 164 N. Y. 335.

rights and privileges of the office. He brought mandamus to compel the committee to restore him to the rights and privileges of a committeeman, and the court allowed him the relief asked for on the ground that the object of the law had been to protect the right of the voters to have their wishes in party matters presented by their chosen representatives, that no right to expel a member was given the committee, and that accordingly he was responsible to those electing him alone.

Section 2. Appointment.

§ 32. **Where the appointing power lies.** It is an underlying principle of American law, subject, however, to many exceptions in practice, that there are three functions of government, the legislative, the executive and the judicial; and that for carrying out these functions there should be corresponding departments of government, each acting independently of the others and confining itself to its proper function. See the article on Constitutional Law, §§ 17-23, in Volume XII of this work. If this principle were carried to its logical conclusion, the legislature would confine itself to laying down general rules, the executive to applying the law, and the judiciary to settling legal controversies. As applied to appointments, the legislature would lay down general rules as to how appointments should be made, the executive would make the appointments, and the judiciary would settle litigation arising therefrom. This logical application of principle, making the power of appointment executive, except in the cases of legislative and judicial clerks and the like where the independence of the other departments demands that

they should make the appointments themselves, has been made in some states; but in the matter of removals as well as of appointments perhaps the greater number of the courts have been inclined to follow the lead of the supreme court of Illinois in the early case of Field v. The People (19).

§ 33. **General grant of executive power does not include appointment of officers.** The court in that case first laid down the generally recognized proposition that the legislature is the residuary power in the state and that accordingly the constitution is a *limitation* upon the powers of the legislative department of the government, but is to be regarded as a *grant* of powers to other departments (20). It then referred to the sections of the Illinois constitution embodying the doctrine of the separation of powers and said: "This is a declaration of a fundamental principle; and although one of vital importance, it is to be understood in a limited and qualified sense. It does not mean that the legislative, executive, and judicial power should be kept so entirely separate and distinct as to have no connection or dependence, the one upon the other; but its true meaning, both in theory and practice, is that the whole power of two or more of these departments shall not be lodged in the same hands, whether of one or many. . . . This clause, then, is the broad theoretical line of demarcation between the three great departments of government. But we are not, therefore, when a question arises as to the extent of the powers of either, to con-

(19) 3 Ill. 79.
(20) Ibid., p. 83.

fine our views to this general clause, which confers no specific powers. We should look to the division as actually made to see what powers are clearly granted, for such only can be exercised." The court then applied the same reasoning to the provision that the executive power of the state shall be vested in a governor. Whatever effect might otherwise have been given to this provision, the grant of specific powers to the executive implied a negative of other powers and so rendered this provision, like that as to the separation of powers, a general political principle but not a rule of law. Nor was the court influenced by the fact that the power of appointment and removal had been considered "executive" in the British government. It repudiated the argument as monarchical and unrepublican.

From this and similar cases it results in many states that where the constitution has not specifically provided for the appointment of officers, the legislature itself can appoint them or confer that power on whom it shall see fit. See the article on Constitutional Law, § 23, in Volume XII of this work. Authority is pretty evenly divided, however, as to whether it may confer the right to appoint administrative officers on the courts (21). It may, however, confer the power on a private association. Thus, an act was held to be constitutional which provided for the appointment of three out of a board of five dental examiners by the Indiana state dental association (22).

§ 34. **Appointment includes selection.** The right to appoint is not a mere ministerial power involving no dis-

(21) Goodnow, Admin. Law of U. S., 40.

(22) Overshiner v. State, 156 Ind. 187.

cretion on the part of the appointing power in selecting the appointee. In People v. Mosher (23) provision had been made by the charter of the city of Binghamton for the appointment by the board of street commissioners of a superintendent of streets and city property. The civil service law of 1899 required that the commissioners appoint to the office the veteran who stood highest on the list furnished by the local civil service commissioners. Upon the list were the names of Bolles, Balcom, and Seabury. Bolles stood highest, Balcom next, and Seabury last. Balcom and Seabury were both honorably discharged veterans. The board was equally divided in favor of the two veterans. Accordingly application for a mandamus was made on the relation of Balcom to compel his appointment, but the court of appeals held that the act was unconstitutional inasmuch as the power to appoint city officers was constitutional and included not only the right to name but also to select. Selection might be limited to the three or four highest on the list, but the doing away with it altogether was inconsistent with the constitutional right to appoint.

§ 35. **What constitutes an appointment.** The leading case on what constitutes an appointment is the famous case of Marbury v. Madison (24). Towards the close of his term of office President Adams nominated to the senate Marbury and others as justices of the peace for the District of Columbia. These nominations were confirmed by the senate and the commissions signed and sealed, but

(23) 163 N. Y. 32.
(24) 1 Cr. 137.

at the expiration of Adam's term they had not been delivered and the new secretary of state, James Madison, refused to deliver them. Thereupon action was brought by Marbury and others to compel the delivery of the commissions. It was claimed that their appointments had never been completed, but Chief Justice Marshall, speaking for the court said: "The last act to be done by the president is the signature of the commission; he has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed: he has decided. His judgment on the advice and consent of the senate, concurring with his nomination, has been made and the officer is appointed. This appointment is evidenced by an open unequivocal act; and, being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction. Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised, when the last act required from the person possessing the power has been performed." Generally this last act is, as in Marbury's case, the signing of a commission, but in some states, especially when the appointment is by a legislative body or by a board, a commission is not required and the last act may be the announcement of the result of a ballot (25). It has been held that an oral announcement made to the appointee in

(25) State v. Barbour, 53 Conn. 76.

the presence of the tribunal charged with the duty of taking the bond and administering the oath of office is a sufficient "open, unequivocal act" (26), but on the other hand the validity of oral appointments has also been denied (27).

§ 36. **Time of appointment.** It is a common practice to appoint to office before the term of the appointee is to commence, but this may not be done if the term of the appointing power does not overlap that of the appointee. Thus in the case of Ivy v. Lusk (28) the term of office of the incumbent expired February 25, 1853, and an appointment of his successor was made March 12, 1852, for the reason, as urged by counsel, that there was no session of the legislature in 1853 and that, if the appointment were not made earlier, a merely temporary appointment would have to be made until the end of the next session of the legislature; but the court held that, as a new governor and legislature came into office prior to the commencement of the new term, it was plain that an appointment thus made by anticipation had no other basis than expediency and convenience, and could only derive its binding force and effect from the supposition that there would be no change of person and consequently of will on the part of the appointing power, between the date of the exercise of that power by anticipation and that of the necessity for the exercise of such power by the vacancy of the office.

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(26) Hoke v. Field, 10 Bush (Ky.) 144.

(27) People v. Murray, 70 N. Y. 521.

(28) 11 La. Ann. 486.

Section 3. Acceptance and Qualification.

§ 37. **Duty to accept.** In the case of People v. Williams (29), decided in 1893, mandamus was brought to compel Williams to accept and qualify for the office of town clerk, as required by law. The question presented was as to the power of the courts to compel the acceptance of municipal office. No case directly in point could be found in this country, but the court referred to the English cases making the acceptance of office obligatory and considered that the principle at the bottom of the English cases applied with even greater force in this country. It said: "All citizens owe the duty of aiding in carrying on the civil departments of government. In civilized and enlightened society men are not absolutely free. The burden of government must be borne as a contribution by the citizen in return for the protection afforded. The sovereign, subject only to self-imposed restrictions and limitations, may, in right of eminent domain, take the property of the citizen for public use. He is required to serve on juries, to attend as witness, and, without compensation, is required to join with posse comitatus at the command of the representative of the sovereign power. He may be required to do military service at the will of the sovereign power. These are examples where private right and convenience must yield to the public welfare and necessity." The lack of adjudicated cases, however, shows that this duty is not often enforced, and, with the generally prevalent desire to hold office, there is little need that it should be. It is sometimes stated that ac-

(29) 145 Ill. 573.

ceptance will not be enforced where there is no salary attached to the office or where the appointee already holds other office.

§ 38. **What constitutes acceptance.** It has been held that acceptance of a nomination is not acceptance of an office (30), but that the actual occupation and exercise of an office will raise a presumption of acceptance. The best evidence of acceptance, however, is qualification, and, if qualification within a given time is a condition precedent to holding office, the failure to qualify within that time is deemed a refusal of the office (31).

§ 39. **Oaths and bonds.** It is usual to require that an officer-elect take an oath of office before entering on the duties of his office, and "public officers to whom are entrusted the collection and custody of public money, and public ministerial officers whose actions may affect the rights and interests of individuals are usually required to secure the faithful and proper discharge of their duties by giving bonds conditioned to that effect. As a rule, political, judicial, military, and naval officers are not required to give bonds" (32). It generally depends on the construction of constitutional or statutory provisions whether the taking of the oath and the giving of the bond are conditions precedent to the holding of the office or merely necessary to perfect legal title. The inclination of the courts, however, is against forfeitures.

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(30) Smith v. Moore, 90 Ind. 294.

(31) Thompson v. Holt, 52 Ala. 491.

(32) Mechem, Public Officers, sec. 263.

SECTION 4. TERM OF OFFICE AND VACANCIES.

§ 40. **Beginning of term.** The limits of a term are usually fixed by the constitution or statute, the beginning of the term being ordinarily placed at such a time after the election or appointment as to give reasonable time for the newly chosen officer to arrange his affairs and qualify. Where no date is fixed, however, the term will commence from the date of election or appointment.

§ 41. **Expiration.** The term of office ordinarily expires at the date fixed by law, but it has been held, where no successor has been appointed or elected, that the old incumbent holds over until the selection and qualification of his successor, and in many states this rule has been embodied in the constitution or statutes. Thus in State v. Bulkeley (33) the term of the respondent as governor of Connecticut was until the Wednesday following the first Monday of January, 1891, and until his successor was duly qualified. Morris, the claimant to the office, urged that he had received a majority of the votes at the recent election; but the court held that the declaration of the result of the election was an essential part of it, that this declaration had to be made by the general assembly, that the general assembly had made no such declaration and that at least until it had or until it was shown that the general assembly had become unable to decide upon the election, the court would not interfere; and that in the meantime the respondent held both as de jure and de facto governor.

§ 42. **When vacancies exist.** Where a term of office

(33) 61 Conn. 287.

expires and the rule of the jurisdiction is against holding over, and no successor has been appointed, elected, or qualified, a vacancy results; as is also the case when the official relation is terminated in any of the familiar ways by death, resignation, removal, or loss of qualifications prior to the expiration of the term. The appointing power must determine the existence of the vacancy in the first place, but this is subject to the review of the courts.

§ 43. **Term of appointee to fill vacancy.** In the case of elective offices, where no provision for a special election is made, the appointee usually holds until the next general election has been held and his successor elected and qualified. In the case of officers appointed with the advice and consent of the upper house there is frequently a provision similar to that in the Constitution of the United States that "the President shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session" (34). During the administration of President Monroe the question arose whether he had the right to fill a vacancy which had not originated during a recess of the senate but which continued to exist after the senate had adjourned. Attorney-General Wirt advised the President that although the letter of the Constitution might seem to deny the right, the reason and spirit of the Constitution would seem to allow the President to make the temporary appointment whenever the public interests required the office to be immediately filled and the advice and consent of the senate

(34) Art. II, sec. 2, § 3.

could not be immediately asked because of the recess. This enables the President to keep an appointee in office where the senate has refused to confirm him, but it has been the practice of the Federal government ever since and was approved in New Jersey in 1889 (35). In Illinois, however, the constitutional provision is so worded as to prevent such a construction (36).

Section 5. De Facto Officers.

§ 44. **Validity of acts.** It would be intolerable if the discovery of some disqualification on the part of one who had performed the duties of an office and been generally recognized as the incumbent thereof should invalidate all official acts done by him without a knowledge on the part of the public or of those dealing with him of the existence of the disqualification. Thus, a board of street and water commissioners had passed an ordinance granting a railroad permission to cross a certain street. Proceedings were brought, principally on the ground that one of the members of the board whose vote was necessary to the passage of the ordinance had accepted an incompatible office prior to the passage of the ordinance and that accordingly his vote had no efficacy. But the court held, as he was in possession of the office under color of a legal title and performing its legal duties without anyone else claiming a right to it, that he was an officer de facto and that there were no facts in this case to justify them "in relaxing the wise and ancient rule so deeply rooted in public policy, that the acts of de facto officers holding

(35) Fritts v. Kuhl, 51 N. J. L. 191.

(36) People v. Forquer, 1 Ill. 104.

under color of title originally lawful, when acting in good faith, will protect third persons and the public in their dealing with them, whether serving alone or as members of a governing or legislative body" (37).

§ 45. **Acquiescence and reputation.** A mere intruder is not an officer de facto. His acts are void and are always open to attack. But long acquiescence and general reputation will render one, who was at first an intruder, an officer de facto even without color of title. Thus, a defendant had been tried in the United States courts on the ground that the murdered man was a United States citizen, when his citizenship depended on whether he had been duly naturalized as a citizen of the Cherokee nation and that depended largely on the validity of a marriage license purporting to be signed by a deputy clerk of the Cherokee nation but actually signed by his son. Mr. Justice Brewer said: "It is true that the younger Dennenberg who signed the marriage license, was neither clerk nor deputy, but he was an officer de facto, if not de jure. He was permitted by the clerk and the deputy to sign their names; he was the only person in charge of the office; he transacted the business of the office; and his acts in their behalf and in the discharge of the duties of the office were recognized by them and also by the Cherokee nation as valid. Under those circumstances his acts must be taken as official acts, and the license which he issued as of full legal force. As to third parties, at least, he was an officer de facto; and, if an officer de facto, the

(37) Oliver v. The Mayor, 63 N. J. L. 634.

same validity and the same presumptions attached to his actions as to those of an officer de jure'' (38)

§ 46. **Color of title.** But in most cases there must be color of title. In the case of State v. Carroll (39) the prisoner moved to erase a case from the docket on the ground that the court before which he was tried was holden by one William H. Morse who had never been elected judge of the same by the general assembly. As a matter of fact Morse had been requested to act in the absence of the regular judge by the clerk of the court under a charter provision, but it was claimed that this provision was unconstitutional because the appointing power lay with the general assembly. It was claimed that there had to be color of appointment or election by the only body which had the power to appoint or elect, but the court went very elaborately into the cases and enumerated among the clearer cases of an officer de facto those where ''he has color of appointment or election and yet is not a good officer for want of authority in the appointing power, or irregularity in exercising it, or because there was another lawful officer entitled to the office, or because the incumbent was ineligible, or had not qualified as the law required, or his term had expired.'' That the law of appointment might be unconstitutional, the court held, did not prevent its giving color of title. But there is no color of title where there has been an adjudication denying the right to the office.

§ 47. **Possession.** The very term de facto officer means

(38) Nofire v. United States, 164 U. S. 657.

(39) 38 Conn. 449.

that he must be officer in fact, that is, exercising the functions of the office. Thus, it was claimed that certain persons were de facto the board of county commissioners, but the court said that it did not seem from the record "that McWhirt and his associates ever got possession of any of the property of the county, or of any of the records, books, papers, the seal, or of anything else belonging to the county or connected in any manner with the office of county commissioners. . . . If the officer de jure is in possession of the office, if the officer de jure is also the officer de facto; then no other person can be an officer de facto for that office. Two persons cannot be officers de facto for the same office at the same time" (40).

§ 48. **No officer de facto without an office de jure.** The great weight of the authority of the Supreme Court of the United States is behind the proposition that "there can be no officer, either de jure or de facto, if there be no office to fill." So the court spoke where it repudiated the contention that a county could be bound by bonds issued by a board created under an unconstitutional law (41), and its dictum has been followed in many of the states. It is subject to the rule in most states, however, that the charter of a municipal corporation can not be attacked, even for unconstitutionality, except in a direct proceeding brought for that purpose, so that at least until that is done the title of the officer of such municipal corporation can not be called in question. And where

(40) McCahon v. Commissioners, 8 Kansas 437.
(41) Norton v. Shelby County, 118 U. S. 425.

an irregularly constituted authority exercises general governmental powers for a considerable time it will be considered a de facto government and a large number of acts done by it recognized as valid. Thus the state governments in the south during the civil war were recognized as de facto governments by the United States courts and many of their acts, not in hostility to the United States, were recognized as valid, although those governments were denied to have a legal existence because of the rebellion.

§ 49. **Rights and duties.** Until a de facto officer is ousted from the office by quo warranto or similar proceedings his rights and duties are much the same as those of de jure officers. His right to the office cannot be questioned in proceedings to which he is not a party, and the principal proceedings to which he is a party in which the question of title can be raised are actions for the salary or other emoluments of the office, or civil actions, such as the old action of trespass, where in order to escape liability he justifies by setting up the official relation. He must then prove legal right to the office. These are the principal points in which the position of a de facto officer differs from that of a de jure officer. He can be compelled to perform the duties of the office and is equally liable for negligence and malfeasance in office.

CHAPTER III.

TERMINATION OF THE OFFICIAL RELATION.

SECTION 1. IN GENERAL.

§ 50. **Abolition of office and expiration of term.** As already seen (§ 4, above), the right to an office is not property nor is it based on contract. Therefore it is not protected by the United States Constitution and if it does not owe its existence to the constitution of the state may be abolished by the state legislature. The expiration of terms of office has already been treated (§ 41, above).

§ 51. **Death.** Death, of course, renders an office vacant where it is held by a single person. But when the office is held by several no such result follows. Thus in the case of People v. Palmer (1) it was claimed that certain accounts were not properly certified because one of the commissioners named in the act had died and another removed from the state, but the court said: "A grant of power in the nature of a public office to several does not become void upon the death or disability of one or more. Such a grant of power is in the nature of a private franchise, which, when granted to two without words of survivorship, might not, by the rules of the common law, survive the death of one. But the policy

(1) 52 N. Y. 83.

of the law is to guard against the failure of a public service and therefore, by statute, it is provided that whenever any power, authority, or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done and such power, authority, or duty may be exercised and performed by a majority of such persons or officers upon a uniting of all, unless special provision is otherwise made. . . . And all do meet when all who are living and qualified to act come together."

§ 52. **Loss of qualifications.** Loss of the qualifications necessary for holding an office is a frequent cause of the termination of the official relation. Thus, the active careers of most army and navy officers in time of peace are brought to a close by their reaching the age of retirement, and the establishment of an age limit in general is advantageous where the tenure of office is for life. Loss of residence may have a like effect. "Thus, where a county officer leaves the county with his family with the intention not to return, or goes to another state with the intention of there making it his home, or voluntarily enlists in the military service of the United States, he is held to have vacated his office; but a mere temporary absence, as to procure medical treatment, or to engage in business for a limited time, or to fill a temporary appointment, where the office may be and is filled by a deputy, does not operate to vacate it" (2).

(2) Mechem, Public Officers, sec. 439.

§ 53. Abandonment and forfeiture. An office may be vacated by abandonment and a persistent neglect of duty may be so gross as to be held an abandonment, but, except on proceedings in the nature of quo warranto or under special statutory provisions, it is seldom held that neglect of duty has ipso facto vacated the office, and even the cases of quo warranto, where it has been held that the neglect of itself forfeited the office, are rare. Neglect of duty is, however, an important cause for removal from office. Likewise the commission of crime may ipso facto work a forfeiture of office, and that was the theory on which the Federal government acted with regard to state officers under the Confederacy, but it is also principally important as a cause for removal from office. Forfeiture of office ipso facto, however, frequently results from a conviction of crime.

Section 2. Removal From Office.

§ 54. Power to remove for cause essentially judicial. The courts have been inclined to view the removal of officers for cause as of an essentially judicial nature. This was the view taken by Chief Justice Marshall of Kentucky in the case of Page v. Hardin (3). In that case the governor had declared that the office of secretary of state had become vacant, because of refusal to reside at the seat of government and perform the duties of the office and had made an appointment to fill the vacancy. The auditor refused to pay the salary of the appointee and the latter brought suit. The court first decided that there had been no such abandonment of the office as to cause

(3) 8 B. Mon. (Ky.) 648.

a vacancy ipso facto and then proceeded to ascertain whether the action of the governor was valid as an exercise of the power of removal. It was provided in the constitution that the office of secretary of state should be held during good behavior so that the following remarks of the Chief Justice must be read with an office of that kind in mind, but they indicate the attitude taken towards the power of removal for cause in general. He said:

"And we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defense and proof. The law too, prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved. Such a proceeding for the ascertainment of fact and law, involving legal right and resulting in a decision which may terminate the right, is essentially judicial, and has been so considered here and elsewhere. By the common law, the forfeiture of an office held by patent or commission, was enforced by scire facias and the judgment of a court. The trial of an impeachment is universally regarded as a judicial function, and the senate, sitting for that purpose, as being a judicial body. Similar proceedings (for the removal of officers) in the county or other courts are held to be judicial. And we do not doubt that every proceeding for the removal of an officer for cause, that is for official misbehavior, is essentially an exercise of the judicial power of the commonwealth, and would

therefore refer itself to the judicial department of the government, if not otherwise disposed of by the constitution or the laws. . . . If it is conceded that the constitution is not to be considered as prescribing exclusive modes and tribunals for the removal of officers, still the function of trial and judgment is essentially judicial, and the function of prescribing the modes of proceeding and the cases to which they apply is legislative. And it would seem, therefore, that any remaining power on the subject should result rather to the legislative and judicial departments, than to the executive, except so far as the legislature might refer the case of any particular officer to the action and judgment of the governor, or to some other officer or tribunal."

§ 55. **Power to remove for cause not included in grant of executive power.** Further, in the above case, the court said: "A power, the obvious and necessary tendency of which is thus subversive of the fundamental principles of official tenure and responsibility clearly established by the constitution, must be regarded as inconsistent with that instrument, and cannot be sustained upon any mere inference as to the extent of the executive power granted to the governor, nor upon any idea of convenience or fitness, however developed or confirmed by experience. If we go out of the constitution and laws for ascertaining the executive power, it would be difficult to find its limits. It is in our government just what the constitution and laws have made it. It is not the power of using all means which may be deemed expedient for ensuring a due execution of the laws, but the power of doing such acts and using such means, at the discretion of the officer, as

the constitution and laws have placed in his hands for securing the due execution of the laws and the regular operation of the government. . . . The governor is responsible for the selection of competent and faithful officers. But he is under no further responsibility for the faithful discharge of their duties but as he may be authorized by the constitution or laws to direct and control them. The duties of public officers, and especially of the secretary, are prescribed by the laws, and to be performed by the officer under his responsibility to the laws . . . And if it be conceded that the relation of the secretary to the governor, as the recorder and attester of his acts, would render it highly convenient that the governor, having full opportunity of knowing whether these and other duties of the secretary are performed with the requisite diligence and skill, should have the power of removing him for failure or defect in these or other particulars; and if it were further conceded that such a power, or even the power of removal at will, would not be inconsistent with the object of placing such an officer near the governor, as evidenced by the requisition that he shall communicate his register, etc., to the legislature when required (as to which we need not decide), still the mere inference, founded on notions of convenience and fitness, must, as already shown, yield to the higher principles of the constitution."

§ 56. **Removal for cause by courts.** The power of courts to remove from office, except on conviction of crime, is principally statutory. The proceedings are somewhat in the nature of impeachment proceedings (4).

(4) In re Curtis, 108 Cal. 661.

Many of the courts have held that they are in the nature of criminal actions and have applied such rules of criminal law as that the guilt of the accused must be established beyond a reasonable doubt (5); while others have held that at least in matters of review and pleading (6) they are to be treated as civil actions. The specification of causes for removal precludes the court from removing for other cause.

§ 57. **Impeachment.** Impeachment is the old constitutional method of removal for cause derived from English precedents, but it is seldom used. The provisions in many of the state constitutions are similar to that of the Federal Constitution which provides that all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors (7); that the lower house shall impeach and the upper house try (8); and that judgment shall not extend further than to removal from office and disqualification to hold office under the United States, but that the party convicted shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law (9).

§ 58. **Removal for cause by executive act.** But it is very common for the constitution or the laws to provide for removal for cause by the executive. "Statutes authorizing the removal of public officers for cause usually

(5) State v. Tally, 102 Cal. 25.

(6) In re Curtis, 108 Cal. 661; in re Burleigh, 145 Cal. 35.

(7) Art. II, sec. 4.

(8) Art. I, sec. 2, § 5, and sec. 3, § 6.

(9) Art. I, sec. 3, § 7.

declare what cause shall be deemed sufficient. This cause is often defined with much exactness, but more frequently general terms are used such as official misconduct, maladministration in office, breach of good behavior, wilful neglect of duty, extortion, habitual drunkenness, and the like" (10). Notice of the charges and opportunity to be heard in his defense must be given the accused, and where the causes are not specified the courts will determine whether the grounds of removal constituted "legal cause." It is a general rule that when a statute specifies certain causes of removal, it impliedly excludes removal for any other cause and it was urged that this rule should be applied in a case where a general appraiser had been removed by President McKinley without charges (11). As the act of Congress simply stated that such an officer might be removed for inefficiency, neglect of duty, or malfeasance in office, it was claimed that under the above principle the removal was improper; but the supreme court held that as it had become well settled in absence of constitutional or statutory restrictions that the President had the power of removal, the right would exist if the statute contained no word on the subject and it would require plain language to take it away. The court said that if the removal was for one of the causes specified, notice and hearing were necessary, but that removal without notice or charges raised a conclusive presumption that the removal was not for one of these causes and therefore could not be regarded as the least im-

(10) Mechem, Public Officers, sec. 457.

(11) Shurtleff v. United States, 189 U. S. 311.

putation on the removed officer's character for integrity or capacity.

§ 59. **Removal on charges and after hearing.** A distinction was made between removal for cause, and removal on charges and after hearing, in the case of In re Guden (12). A sheriff had been removed by the governor after notice and hearing, but the former claimed that the charges did not constitute "good cause" and asked the court to compel the appointee to deliver to him the books of the office. Where the removal can be only for good cause the general rule is that the court will go into the question as to whether the charges are sufficient, but the court said that in its nature the power of removal was executive, that the suggestion that removals should be given the character of judicial proceedings had been repudiated in the constitutional conventions, and that accordingly the power to decide whether Guden should be removed from the office of sheriff and the responsibility for a right decision rested solely with the governor. Chief Judge Parker said: "The suggestion that, if the courts do not interfere, some chief executive may proceed in disregard of those principles which courts of impeachment have established, should not be given weight, for the ability to act quickly in the removal of administrative officers and clerks is as important in the conduct of government as in the management of a gigantic corporation or large individual enterprise. The attempt to safeguard the rights of the official or the clerk should not be carried to such an extent as to override the

(12) 171 N. Y. 529.

interests of the public, for the public business is of paramount importance."

§ 60. **General power to remove: State practice.** Where the general power to remove is given, the removing power is not subject to the control of the courts nor does notice or hearing have to be given. The desirability of this general power is seen from the quotation from Chief Judge Parker's opinion given above, but its express grant is comparatively rare so that resort must be had to implication and as we have seen in Field v. People (§§ 32-33, above) the supreme court of Illinois held that the constitutional provision that the executive power of the state shall be vested in the governor conferred no specific powers on him and that for the executive to have right of appointment or removal it had to be specifically conferred. This view was also the one expressed by Chief Justice Marshall of Kentucky (§§ 54-55, above) and it has been generally followed in the states.

§ 61. **Same: Federal practice.** The practice in the Federal government, however, has been different. In the case of Parsons v. United States (13) a district attorney was removed by the President and his successor appointed by and with the advice and consent of the senate, but he claimed that as his appointment had been for four years he had a legal right to it for that time. The supreme court reviewed the history of the right of removal in the Federal government, showed how the first session of Congress under the Constitution had considered this power to lie with the President, referred to the

(13) 167 U. S. 324.

controversy arising out of the removal of Secretary of the Treasury Duane by President Jackson and the concession of Daniel Webster that the practice of the government had settled that power in favor of the President, cited numerous opinions of attorneys-general, and finally referred to the struggle between President Johnson and Congress, the enactment of the tenure of office acts by Congress limiting the power of removal, and their subsequent repeal. The practice for over a hundred years, the court considered, left the power of the President to remove, at least in absence of statutory restriction, no longer open to question. From this it results that the President is really responsible for the enforcement of the law, whereas in the states, as intimated by Chief Justice Marshall of Kentucky, that responsibility lies principally with the courts. The far reaching importance of this power in the control of administration will be seen later (§ 94, below).

§ 62. **Power of removal incident to power of appointment when tenure of office not fixed by law.** "Offices, even though appointive, are usually created to be held for a definite time, as for a given number of years, or during life or good behavior. In some cases, however, no such tenure is fixed by law, and the officer must hold, either expressly or impliedly, at the will or pleasure of the appointing power, or his tenure must be indefinite and subject to no will but his own, a construction which is entirely inconsistent with the spirit of our institutions. Where, therefore, the tenure of office is not fixed by law and no other provision is made for removals, either by the constitution or by statute, it is said to be a sound and

necessary rule to consider the power of removal as incident to the power of appointment'' (14).

§ 63. **Power of suspension.** In the case of State v. Megaarden (15) proceedings were brought against the respondent to oust him from office during the course of statutory proceedings for his removal. As no express right of suspension was given the governor it was claimed he had none. But the court said: ''It ought not, therefore, to be held that the unquestionable power to remove should be so handicapped by an interpretation of the statute as to defeat the very object it seeks to attain,'' and so held in favor of the power. There is authority to the contrary, however, even pending proceedings for removal (16), and that the power of suspension is ordinarily incident to the power of removal is generally denied. Thus in the case of Gregory v. Mayor (17) the commissioners of excise assumed to suspend the plaintiff, who was an inspector of excise, without pay, but he subsequently brought suit for his salary and the suspension was held unauthorized. The court said: ''Whether the power to remove includes the power to suspend, must, as it seems to us, depend, among other things, upon the question whether the suspension in the particular case would be an exercise of a power of the same inherent nature as that of removal, and only a minor exercise of such power, or whether it would work such different results

(14) Mechem, Public Officers, sec. 445; Ex parte Hennen, 13 Peters 230.

(15) 85 Minn. 41.

(16) Ex parte Lehman, 60 Miss. 67.

(17) 113 N. Y. 416.

that no inference of its existence should be indulged in, based only on the grant of the specific power to remove. We think it is apparent that the two powers cannot always be properly respectively described as the greater and less, and, consequently, it cannot always be determined, simply upon that ground, that the suspension is valid because there was a power to remove. The power to remove is the power to cause a vacancy in the position held by the person removed, which may be filled at once, and, if the duties are such as demand it, it should be thus filled. The power to suspend causes no vacancy and gives no occasion for the exercise of the power to fill one. The result is that there may be an office, an officer, and no vacancy, and yet none to discharge the duties of the office. . . . It seems to us that the power of removal in such cases as this was entrusted to the commissioners to be exercised, if at all, at once and finally. It was not meant that they should have power to arbitrarily suspend without pay, and then appoint some other in the place of the suspended man, and perhaps suspend or remove the alternate and again appoint some other. The tendency would be to confuse instead of to perfect the service. The effect upon the suspended man would also be demoralizing, causing him to expend his time in efforts to get reinstated rather than in endeavors to procure a livelihood in other ways which would be the result of a removal."

Section 3. Resignation or Acceptance of Incompatible Office.

§ 64. Right to resign. We have already seen that the duty to hold local office, at least, is generally considered

as obligatory (§ 37, above). In such cases, of course, there can be no right to resign. Thus in the case of Badger v. United States (18) the right to issue a mandamus to certain town officers depended on the effect of their attempted resignations and the acceptance of the same by the justices of the town. If they had ceased to be officers thereupon, the mandamus was improper. The court held, however, under the provision of the Illinois statutes, that these officers should hold until their successors were elected and qualified, that the resignation to become perfect must be followed by the election and qualification of the successor, and so upheld the mandamus. As a rule, however, acceptance by a duly constituted authority perfects a resignation.

§ 65. **Acceptance.** In the case of State v. Ferguson (19), the issue to be tried in the case was whether the defendant at the time of the service of the writ of mandamus upon him was still overseer of the highways of the township. He had sent in his resignation to four of the township committee who had endorsed on it an acceptance, but it appeared that the fifth committeeman had not been notified of the meeting at which the resignation was received and accepted and was not present at it. The court held that under the common law rule, acceptance of the resignation was necessary; that it was not apparent where the township committee derived any authority to accept the resignation, as the office was elective and their only express power bearing on the case at all was

(18) 93 U. S. 599.
(19) 31 N. J. L. 107.

the power to fill vacancies; but that even if they had the power to accept resignations it had not been exercised legally in this case, as the meeting at which the resignation was accepted had not been regularly convened.

§ 66. **Time.** Where acceptance of a resignation is deemed necessary, the resignation does not become complete until the acceptance, but where the common law rule has been changed it may take effect earlier. Thus in the case of Reiter v. State (20), the mayor of the village of Pleasant Ridge presented his resignation to the city council on February 21, 1893, to take effect the first of the following month. The resignation was not acted on until the next meeting, March 7, when it was accepted; and on March 11 Reiter was appointed to fill the vacancy. The next annual municipal election was held April 3 and a mayor elected to fill the unexpired term, but, as it was provided by law that the filling of the vacancy by election should take place thirty days after the vacancy, Reiter claimed that the vacancy did not occur until the acceptance of the resignation on March 7, that accordingly the election was held within the thirty days and was invalid, and that he was still mayor. But the court said that the common law doctrine of the necessity of an acceptance seemed inconsistent with the Ohio statutes, pointed to the fact that in a number of states the common law rule had been changed, considered that in a case of this kind the necessity of an acceptance might "tempt a partisan officer to delay the acceptance of a resignation until too late

(20) 51 Oh. St. 74.

to fill the vacancy at the succeeding election," and held accordingly that the resignation in question took effect March 1 and that the election was valid.

§ 67. **Acceptance of incompatible office vacates prior office.** In the case of Attorney-General v. Common Council (21), Pingree, while mayor of the city of Detroit, was elected to and entered upon the execution of the duties of the office of governor. He continued to perform both functions when this action was brought to compel the calling of an election to fill the vacancy which it was claimed his acceptance of the office of governor had made in the office of mayor. The court pointed out that the governor had the right to remove the mayor and said: "If a superior officer is clothed with power to remove from office an inferior person, there is certainly no logic or reason in holding that one person may hold both. No more marked incompatibility is possible." Accordingly the court held that the office of mayor was vacated. Where acceptance of resignation is not necessary or where the power which appoints to the second is the same power to whom would be made surrender of the first, this rule that the acceptance of the second vacates the first prevails; but, in the case of Attorney-General v. Marston (22) there was no such absolute right of resignation, and the court held that as the offices of collector of taxes and selectman were incompatible, and as the defendant had been collector of taxes when elected selectman without any resignation of the office of collector having been accepted, that

(21) 112 Mich. 145.
(22) 66 N. H. 485.

the first office was not vacated, but that he had never been de jure selectman and ousted him from that office.

§ 68. **In what incompatibility consists.** It is not mere physical impossibility to perform the functions of two offices that makes them incompatible. A deputy clerk of the court of special sessions for the city and county of New York had been elected a member of the legislature, and had been engaged in the performance of the duties of the latter office in the city of Albany during the months of February, April and May, thus making it impossible to perform the duties of a deputy clerk during that time. His salary as deputy clerk for three months was not paid and he brought suit for it. The court held that he had a right to it and said: "It is clearly shown in those opinions that physical impossibility is not the incompatibility of the common law, which existing, one office is ipso facto vacated by accepting another. Incompatibility between two offices is an inconsistency in the functions of the two; as judge and clerk of the same court, or officer who presents his personal account subject to audit and officers whose duty it is to audit it" (23).

(23) People v. Green, 58 N. Y. 295.

CHAPTER IV.

AUTHORITY AND POWERS OF OFFICERS.

Section 1. Authority.

§ 69. **Derived from law.** We have already seen that offices must be created by law (§ 6, above), and that in the states it is generally held that officers are responsible to the law and not to the chief executive (§ 5, above). It is also generally true that the authority of an officer must trace itself to the common law, to the constitution, to some statute, or to some administrative or municipal regulation authorized or ratified by law, and cannot find its source in the constitutional power of the chief executive to enforce the law. But in the Federal government officers are far more responsible to the chief executive than they are in the states, and in the case of In re Neagle (1) it was held that the order of the President prescribing certain duties to a United States deputy marshal was a sufficient authority to exempt the latter from the jurisdiction of the state courts. There being reason to apprehend an assault upon Mr. Justice Field of the Federal Supreme Court, while discharging his duties in California, the United States marshal there, at the suggestion of the attorney-general of the United States, appointed Neagle a deputy marshal to protect Judge Field. In discharging

(1) 135 U. S. 1.

this duty Neagle killed one Terry, as he considered, in defense of Justice Field's life. He was charged with murder in the California courts, but was released on habeas corpus by the Federal circuit court, which was affirmed by the Supreme Court.

In order to affirm the release it was necessary to bring the case within the Federal habeas corpus statute, providing for the release of prisoners "in custody for an act done or omitted in pursuance of a *law* of the United States." There was admittedly no express statutory provision authorizing deputy marshals to accompany judges on circuit; and the principal ground taken by the court was that there was an express constitutional duty on the President to "take care that the laws be faithfully executed," that for the execution of the laws it was essential that the judges should be protected in the discharge of their high duties, that even in the absence of a legislative act for that purpose the President could order suitable officers to see to such protection, and that such order would be "a law" within the meaning of the provision with regard to habeas corpus and entitle the officer to release from the state courts. As we have seen (§ 55, above) a similar argument from the duty of the chief executive to enforce the laws was made in Kentucky to show that the governor had the right of removal, but Chief Justice Marshall of that state repudiated it and said that officers were to look to the law and not to the orders of supposed superiors, so it is unlikely that the doctrine of In re Neagle will bear much fruit in the states where the ideas expressed by the Kentucky court are generally prevalent.

§ 70. **Implied powers.** It is clear that it would be impossible to mention specifically every duty required of an officer, and so powers are implied from those expressly conferred by the appropriate authority. The rule as to implied powers, as stated by Throop, is, "that in addition to the powers expressly given by statute to an officer or board of officers, he or it has, by implication, such additional powers as are necessary for the due and efficient exercise of the powers expressly granted, or as may be fairly implied" (2).

§ 71. **Statutory and common law powers.** "Where the office is a new one, or one unknown to the common law, the nature and extent of the authority and the terms, manner and conditions of its exercise must be set forth, in some express enactment, with sufficient clearness and fullness to enable it to be interpreted and executed with reasonable certainty. Where, however, the office is one which was recognized and regulated by the common law, while it is undoubtedly competent for the law-making power to expand or curtail its limits or declare the manner in which it is to be exercised, yet where this has not been done, but, as is customary in the case of sheriffs, coroners, constables, and other common-law officers, the office is simply created by name without any definition of its powers or duties, it will be presumed that the intention was that the office should be exercised as at common law, and the common-law incidents, powers and limitations will attach to it" (3).

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(2) Throop, Public Officers, sec. 452.

(3) Mechem, Public Officers, sec. 502.

§ 72. **Powers after expiration of term.** Even aside from the doctrine of de facto officers (§§ 44-49, above), an officer may be entitled to complete certain unfinished work after the completion of his term. Thus in Lawrence v. Rice (4) it was held that where a deputy sheriff had attached certain property he was bound to keep it safely until thirty days after judgment, even though his term of office had expired in the meantime; and Chief Justice Shaw said: "It seems to be a well settled rule of law, a rule of the common law recognized and confirmed by statute, that when an executive officer has begun a service, or commenced the performance of a duty, and thereby incurred a responsibility, he has the authority and indeed is bound to go on and complete, although his general authority, as such officer, is superseded by his removal, or his derivative authority terminated by the determination of the office of his principal."

§ 73. **Territorial jurisdiction.** Acts outside an officer's jurisdiction are void. In the case of Page v. Staples (5) the plaintiff brought action against the defendant, who was a deputy sheriff of Providence county, for false imprisonment, because in conducting him to the county jail in Providence county Staples had carried him through a part of Kent county. The supreme court of Rhode Island considered that the plaintiff had a good cause of action. It said: "We do not think that the defendant can justify the taking of the plaintiff through a part of Kent county for the purpose of committing him to the jail in Providence county. In the absence of statutory provi-

(4) 12 Metcalf, 527.

(5) 13 R. I. 306.

sions, the power of a sheriff is limited to his own county. He is to be adjudged as sheriff in his own county and not elsewhere. He cannot, therefore, execute a writ of his own county elsewhere and if he attempts to do so becomes a trespasser. The only exceptions to this principle are, that having a prisoner in his custody upon a writ of habeas corpus, he has power, by virtue of the writ, to travel through other counties if necessary in order to take his prisoner to the place where the writ is returnable, and he may, also, upon fresh pursuit, retake a prisoner who has escaped from his custody into another county." The same principles apply to other territorial officers.

§ 74. **Jurisdiction of the person.** Cases where officers go outside their territorial jurisdiction are comparatively rare, but cases where officials have been within their territorial jurisdiction but have attempted to exercise authority over persons outside have been frequent. Perhaps the most frequent examples of this on the part of administrative officials have been in cases of personal taxation. The old common law rule was that a person should be taxed on his personal property where he lived, and this was the law prevailing in New York in the case of Mygatt v. Washburn (6), where the plaintiff had moved from one town to another while the proceedings to make out the assessment were going on but before the assessment had finally been made. His name was placed on the assessment roll of the first town nevertheless, a warrant issued for the collection of the tax and his personal property sold. He brought an action against the assessor

(6) 15 N. Y. 316.

and obtained judgment. The court said: "The plaintiff, therefore, was not subject to the jurisdiction of the assessors. In placing his name on the roll, and adding thereto an amount as the value of his personal property they acted without authority. . . . They are, therefore, responsible to the plaintiff for the damages which ensued." In the subsequent case of Bell v. Pierce (7) the law of New York had been modified so that when a person resided in two or more towns during the year his principal place of business was to be considered his residence on the day of assessment. The plaintiff in the case had a home in Buffalo and one in the town whose assessors he was suing in this case, and on the day of assessment was actually occupying the latter, but he claimed that his principal place of business was Buffalo and that accordingly the assessors had had no jurisdiction over him and were liable to damages. The court held that the residence gave the jurisdiction and that "where the principal business of the plaintiff was transacted was a matter of fact, to be ascertained by proof and to be settled by judicial determination. This determination was to be made by the assessors. It was to be made upon proof presented, or, if none was presented, by the best means of knowledge possessed by them. They are not liable for an erroneous decision of a question which they had jurisdiction to decide."

§ 75. **Jurisdiction as to subject matter.** The principle of the last two cases that the determination of administrative officers may be final as to questions *within* their

(7) 51 N. Y. 12.

jurisdiction but not as to questions *of* their jurisdiction, finds frequent application when the question is one of authority over the subject matter. Thus in the case of People v. Board (8), where the act of a board of health in declaring certain dams nuisances was involved, the court said: "Boards of health under the acts referred to cannot, as to any existing state of facts, by their determination make that a nuisance which is not in fact a nuisance. They have no jurisdiction to make any order or ordinance abating an alleged nuisance unless there be in fact a nuisance. It is the actual existence of a nuisance that gives them jurisdiction to act." And this seems to be the general rule as to nuisances. In the case of Raymond v. Fish (9), however, the court considered that the jurisdiction of the health authorities extended even to a conclusive determination of the fact of nuisance. It said: "The statute does not mean to destroy property which is not a nuisance, but who shall decide whether it is so? All legal investigations require time, and cannot be thought of. If the board of health are to decide at their peril, they will not decide at all. They have no greater interest in the matter than others, further than to do their duty; but duty, hampered by a liability for damages for errors committed in its discharge, would become a motive of very little power. It would seem to be absolutely necessary to confer upon some constituted body the power to decide the matter conclusively, and to do it summarily, in order to accomplish the object the statute has in view. We think this has been done."

(8) 140 N. Y. 1.
(9) 51 Conn. 80.

§ 76. **Abuse of discretion.** But even though the act is within the jurisdiction of the officer and his determination is made final he must not abuse his discretion. Thus in the case of United States v. Ju Toy (10) the Supreme Court of the United States held that under the exclusion act it was within the power of the secretary of commerce and labor to pass conclusively on the citizenship of a Chinese claiming admittance into the country, but intimated that it would have looked into any abuse of authority if such had been alleged. In the case of Dental Examiners v. People (11), where the Illinois state board of dental examiners were required to issue licenses to any regular graduate of any reputable dental college, it was admitted that the courts would not control the discretion of the board in determining which were reputable dental colleges, but it was said: "If a discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. They will interfere where it is clearly shown that the descretion is abused." And so in the case at hand the court held that as the dental examiners, by not denying the facts of the petition, had admitted that the dental college in question was "reputable," not to grant the license was a gross abuse of the discretion vested in them, which would not be tolerated.

§ 77. **Disqualification on account of interest.** It is an old maxim that no one should be a judge in his own cause, but the principle involved is not confined to judges. In

(10) 198 U. S. 253.
(11) 123 Ill. 227.

Goodyear v. Brown (12) the deputy secretary of internal affairs had procured a warrant to be issued to himself for nine hundred acres of land alleged to be vacant but on which the plaintiff and those through whom he derived title had paid taxes for nearly a century and which he claimed to be covered by an old warrant. He protested to the board of property of which the secretary of internal affairs was a member, but this tribunal decided against him and a patent was issued to the deputy secretary. The plaintiff then appealed to the courts, but he was at a great disadvantage, as "every paper and every scrap of evidence relating to the issuing, location and return of his warrant, was in the possession and under the control of his adversary" in the secretary's office. The court held that the warrant issued to the deputy secretary conveyed no title and said: "Whether we consider the interests of the citizens for whose security and protection the state exists, or the preservation of public confidence in the purity of the administration of public affairs, or the honor and character of the officer as a public servant, the conclusion reached is the same. Public policy cannot tolerate such dealings by an officer with his own department or office. It will not uphold them."

§ 78. **Mandatory and directory statutes.** In the case of French v. Edwards (13) the defendant asserted title to the premises in question under a sheriff's deed for unpaid taxes, and the whole question turned on the validity of the deed. The statute provided that the sheriff should only sell the smallest quantity of the property which any

(12) 155 Pa. St. 514.

(13) 13 Wall. 506.

purchaser would take and pay the judgment and costs, and this provision the sheriff had not complied with. Mr. Justice Field, for the court, said: "There are undoubtedly many statutory requisitions intended for the guidance of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise." Accordingly the deed was held void. Similarly, where sealed bids had been required and part of the articles furnished were not included in the bid but were purchased in the open market, it was held that the warrant for the supplies was void on the ground that the provision as to sealed bids was mandatory (14).

§ 79. **Presumptions.** It is said by Mechem that "it is a constant presumption, attending the execution of

(14) Mulnix v. Mutual Life Ins. Co., 23 Colo. 71.

official duty, where a public officer has assumed as such to do any act which could be lawfully done only under the protection and by virtue of official power, that he was authorized to do the act in the manner and under the circumstances existing and adopted in that case," but, "to this presumption of the due execution of official authority certain exceptions exist. Thus where the officer acts under a naked statutory power with a view to divest, upon certain contingencies, the title or right of a citizen, as in the case of a sale of land for taxes or its seizure under the right of eminent domain, the regularity of the proceeding will not be presumed, but it is incumbent upon the person claiming by virtue of them to show that every preliminary step required by the law has been taken" (15).

§ 80. **Ratification.** The rules with regard to ratification treated in the article on Agency in Volume I of this work apply to public officers as well, though of less frequent application. Their most frequent application is in time of riot, insurrection, or war. Here, as in private agency, the principal cannot render valid what it would not have had the power to authorize at the time. Thus, in Marsh v. Fulton County (16) it was claimed that even if the bonds in question had not been properly authorized that they had been validated by ratification, but the court said: "The supervisors possessed no authority to make the subscription or issue the bonds in the first instance without previous sanction of the qualified voters of the county. The supervisors in that particular were mere

(15) Mechem, Public Officers, secs. 525, 581.

(16) 10 Wall. 676.

agents of the county. They could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization."

§ 81. Delegation. It is a general rule that administrative officers charged with ministerial duties may delegate them to subordinates, but where there is a special confidence imposed or where the duties call for the exercise of judgment or discretion they cannot be delegated to others. Thus, in Attorney-General v. Jochim (17) the secretary of state, the state treasurer, and the commissioner of the state land office composed the board of state canvassers, and their only duties as such were to canvass the returns from the various counties of the state and declare the result of elections for state officers and upon constitutional amendments. The court said: "It appears to have been the design of the lawmakers to place the votes of the people in the keeping of the most responsible officers of the state; and no argument ought to be necessary to show that it was not expected that the returns would, upon their arrival, be turned over to an irresponsible clerk in the secretary's office, having no official relation to the canvass, and that the mere signing of their three names to his production should constitute a full compliance on the part of these officers with the law prescribing the duties of state canvassers." Accordingly the court held that their action in this matter was a sufficiently gross neglect of duty to warrant removal by the governor. The rule has been most often applied to judicial and municipal officers.

(17) 99 Mich. 358.

As will be seen in the next section, however, legislatures can delegate to municipal corporations the ordinance power, the power to determine certain facts upon the happening of which a law shall go into operation, and the power to issue administrative regulations.

SECTION 2. JUDICIAL POWERS OF ADMINISTRATIVE BODIES.

§ 82. **Power to punish for contempt.** In the case of Langenberg v. Decker (18) the general assembly of the state had attempted to confer on the state board of tax commissioners power to send for persons, books and papers, to examine records, to hear and question witnesses, and to punish for contempt those refusing to appear or answer questions, by fine not exceeding one thousand dollars and imprisonment not exceeding thirty days or both —and in pursuance of this power the commissioners, on the refusal of Decker to appear and answer questions, imposed a fine on him and committed him to jail, but the court held that "the power to punish for contempt belongs exclusively to the courts, except in cases where the constitution of a state expressly confers such power upon some other body or tribunal." In the case of Interstate Commerce Commission v. Brimson (19), where Congress had authorized the interstate commerce commission to require the attendance and testimony of witnesses and the production of papers, and in case of disobedience to invoke the aid of the United States courts; and in pursuance of the statute the commission had petitioned in the United States circuit court that an order might be made

(18) 131 Indiana, 471.
(19) 154 U. S. 447.

requiring certain witnesses to appear before them and answer certain questions, the Supreme Court of the United States held that the order should have been granted. It said: "As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the interstate commission is not calculated to attain the object for which Congress was given power to regulate interstate commerce." But it has been held constitutional for a tax collector to arrest a person for the nonpayment of taxes (§ 108, below).

§ 83. **Power to pass on title to realty.** In the case of People v. Chase (20) the legislature of Illinois had passed an act concerning land titles which provided that one claiming to own land might apply to the registrar of titles to have his title registered, that it then became the duty of the registrar to examine into the truth of the facts stated in the application and other pertinent facts, and to notify all interested persons at least ten days before the granting of the certificate of registration. It was then the duty of the registrar, aided by two examiners, to settle any issue between the parties, or, in case there was no contest, the claim of ownership, and, in a proper case, to issue the certificate of ownership which could not be contested after five years except under special circumstances. The supreme court of Illinois considered that this was a clear case of conferring judicial power on an administrative officer and declared the act unconstitutional.

(20) 165 Ill. 527.

§ 84. **Power of final determination of fact of citizenship.** In another place will be considered the proceedings under the Chinese exclusion acts (§ 105, below). In the case of United States v. Ju Toy (21) the United States Supreme Court went so far as to hold that even on a question of citizenship the decision of the secretary of commerce and labor might be final where no abuse of authority was alleged. The court said: "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth Amendment applies to him and that to deny entrance to a citizen is to deprive him of liberty we nevertheless are of the opinion that with regard to him due process of law does not require a judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws. The decision may be entrusted to an executive officer and his decision is due process of law."

§ 85. **Power of final determination of mixed questions of law and fact.** In the case of American School of Magnetic Healing v. McAnnulty (22), the postmaster-general had excluded literature on mental healing from the mails under his power to exclude fraudulent matter, but the court held that how far the claim of mental healers were borne out by actual experience was a matter of opinion and that, unless the question could be reduced to one of

(21) 198 U. S. 253.
(22) 187 U. S. 94.

fact as distinguished from opinion, it could not be said to be a matter of fraud. It said that this was a matter of law on which the decision of the postmaster-general was not final; but in the case of Bates & Guild Co. v. Payne (23), where the postmaster had decided that a publication known as "Masters in Music" was really sheet music disguised as a periodical and so not to be entered as second class mail matter, the court said that though the question was largely one of law there was some discretion "left in the postmaster-general with respect to the classification of such publications as mail matter, and that the exercise of such discretion ought not to be interfered with unless the court be clearly of opinion that it was wrong." And it seems clear that at common law there were considered to be many questions both of law and fact, not going to the jurisdiction, which administrative bodies might determine without review by the courts.

§ 86. **Local administrative bodies.** But the principle that administrative bodies should not exercise judicial powers does not apply to local administrative bodies. Thus, mayors of towns have frequently exercised judicial functions, and the duties of county courts have been both judicial and administrative, but in deference to long tradition the courts have not felt inclined to interfere. See the article on Constitutional Law, §§ 18-19, in Volume XII of this work.

SECTION 3. ADMINISTRATIVE REGULATIONS.

§ 87. **Pilotage.** In the case of Martin v. Witherspoon (24) it was held, under an order of the governor and

(23) 194 U. S. 107.

(24) 135 Mass. 175.

council, providing that an outward bound vessel, liable to pilotage if inward bound, should be held to pay pilotage to the pilot offering his services whether such services were accepted or not, that a pilot could recover the pilotage fees from the owner of the vessel. The court said: "This is not a surrender of the power of legislation to the governor and council upon the recommendation of the public commissioners, but simply an authority to control, in the matter of pilotage, the vessels going out of the harbor, as well as those coming into it. Such regulations are in the nature of police regulations, the making of which, within defined limits, may be entrusted to other bodies than the legislature. It would not be questioned, we presume, that the governor and council might change the lines within which pilots are to be taken by incoming vessels, yet this would be to fix the liability of the vessel for pilotage by a regulation. It is hardly more to prescribe under what circumstances outgoing vessels shall be compelled to take pilots, legislative regulation having already determined in most important respects the duties of pilots in relation to such vessels, and provided that they shall only be required to take pilots from their port of departure."

§ 88. **Health.** Health is another of the great number of matters that have been the subject of administrative regulation. In Blue v. Beach (25) the plaintiff asked for an injunction to prevent the teacher and superintendent of a school in the city of Terre Haute from excluding his son from the school. The exclusion had been made under

(25) 155 Ind. 121.

an order of the local board of health, pursuant to a rule of the state board of health, that in all cases where an exposure to smallpox was threatened, it should be the duty of the board of health within whose jurisdiction such exposure should have occurred to compel the vaccination of all exposed persons. The validity of this rule was attacked, but the court said: "In order to secure and promote the public health, the state creates boards of health as an instrumentality or agency for that purpose, and invests them with the power to adopt ordinances, by-laws rules, and regulations necessary to secure the objects of their organization. While it is true that the character or nature of such boards is administrative only, still the powers conferred upon them by the legislature, in view of the great public interests confided to them, have always received from the courts a liberal construction, and the right of the legislature to confer upon them the power to make reasonable rules, by-laws, and regulations, is generally recognized by the authorities." After referring to decisions in other states holding that it was beyond the powers of state boards of health, acting without express statutory authority, to exclude children for not being vaccinated in the absence of any special danger, the court said that, as the rule in question made vaccination necessary only in case of danger, its validity was consistent with the holdings in those cases and refused the injunction.

§ 89. **Use of records.** In Boske v. Comingore (26) a proceeding had been instituted in a Kentucky court for

(26) 177 U. S. 459.

the purpose of ascertaining the amount of whisky which the defendants had in their bonded warehouse but which they had not listed for taxation, and in the course of the proceeding they took the deposition of Comingore, collector of internal revenue, but the latter refused to file with his deposition copies of certain reports made to him by the distillers of liquors in their warehouses because of certain regulations formally promulgated by the commissioner of internal revenue with the approval of the secretary of the treasury, forbidding the use of the records in the hands of the collectors for any other than revenue purposes. Comingore was ordered to pay a fine for contempt of court for not producing the record, and on refusal to pay the fine was taken into custody by the sheriff, whereupon he sued out a writ of habeas corpus in the United States courts. On appeal to the Supreme Court of the United States it was held that the same presumption was to be made in favor of the validity of regulations as is made with regard to the constitutionality of statutes, that reasons of public policy might have suggested the necessity of guarding the information gained by the treasury department so as not to affect private business, while on the other hand great confusion in the records might have resulted if their use had not been properly regulated. So the regulations were upheld and the discharge of the collector affirmed.

§ 90. **Supplementing penal legislation.** In the case of In re Kollock (27) Congress had provided that packages of oleomargarine should be marked and branded and

(27) 165 U. S. 526.

original packages stamped as the commissioner of internal revenue with the approval of the secretary of the treasury should prescribe, subject to fine and imprisonment. Kollock was convicted of violating the statute, but claimed it to be invalid on the contention that it delegated power to determine what acts should be criminal by leaving the stamps, marks, and brands to be defined by the commissioner. His claim rested largely on the case of United States v. Eaton (28), where, under a Congressional provision that "if a person shall knowingly or wilfully, omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited . . . . he shall pay a penalty," etc., there was authority given to the commissioner of internal revenue to make regulations to carry the act into effect, and he had required the keeping of books in a certain form and the making of a monthly return. The court had held in that case that it was necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense and did not think that the statutory authority was sufficient. But the court said that Kollock's case was an entirely different one, as "here the law required the packages to be marked and branded; prohibited the sale of packages that were not; and prescribed the punishment for sales in violation of its provisions; while the regulations simply described the particular marks, stamps, and brands to be used." So Kollock's conviction was upheld.

(28) 144 U. S. 677.

§ 91. **Regulations conditioning statutory rights: Ministerial duty.** In the case of Campbell v. United States (29) an act of Congress had "allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the secretary of the treasury." The secretary established such regulations, but in the case at hand the collector had merely acknowledged the receipt of the entry required by the regulations and had refused to make the subsequent examination of the articles intended for export or to give the drawback certificate based on it. This refusal of the collector, under the instructions of the secretary of the treasury, to carry out the regulations, was held by the court of claims to defeat Campbell's claim, but the Supreme Court took a different view. It said: "It is an error to suppose that the officers of customs, including the secretary, are in regard to this law created a special tribunal to ascertain and decide conclusively upon the right to drawback. Their function is entirely ministerial. They are authorized to pass upon no question essential to the claimant's rights so as to conclude him in a court of competent jurisdiction. From the moment he presents his sworn entry, they simply ascertain quantities, identify and mark packages, accept bonds and sureties, and see that the exported article leaves the port in the ship. These and like duties being discharged, it is the collector's duty—a mere ministerial

(29) 107 U. S. 407.

function—to give the certificate of drawback. The amount of it is fixed at seventeen cents per hundred pounds by the regulation, he has nothing to do but to calculate the amount at that rate on the number of pounds shipped. He exercises no judicial or quasi-judicial function. He concludes nobody's right and has no power to do so. The rights which the law gives cannot be defeated by his refusal to act, nor by his decision that no drawback was due."

§ 92. **Same: Discretionary duty.** In Dunlap v. United States (30) it was held that there the right of the plaintiff was conditioned by the secretary's action in failing to make regulations, but the situation was quite different. Congress had provided that "any manufacturer finding it necessary to use alcohol in the arts, or in any medicinal or other like compound, may use the same under regulations to be prescribed by the secretary of the treasury, and, on satisfying the collector of internal revenue for the district wherein he resides or carries on business that he has complied with such regulations and has used such alcohol therein, and on exhibiting and delivering up the stamps which show that a tax has been paid thereon, shall be entitled to receive from the treasury of the United States a rebate or repayment of the tax so paid." As soon as the act containing the above provision became a law, Congress adjourned, and at its first meeting the secretary reported a draft of regulations he desired to prescribe, stating that their enforcement would cost half a million dollars annually for which no appro-

(30) 173 U. S. 65.

priation was available, and that therefore he could not execute the section till Congress took further action, and finally, a little less than two years later, the section was repealed. Dunlap claimed a rebate in accordance with the terms of the statute, but the court said that it did not consider the duty of the secretary in this case to be merely ministerial as in the former case, but that in its opinion Congress "manifestly regarded adequate regulations to prevent loss through fraudulent claims as absolutely an essential prerequisite, and may reasonably be held to have left it to the secretary to determine whether or not such regulations could be framed, and if so, whether further legislation would be required." The court said: "If the duty of the secretary to prescribe regulations was merely ministerial, and a mandamus could, under the circumstances, have issued to compel him to discharge it, would not the judgment at which he arrived, the action which he took and his reference of the matter to Congress, have furnished a complete defense?" So the court held that in this case the statutory right was conditioned on the regulations, though four of the justices dissented.

§ 93. **Regulations must be in accord with the law.** In the case of United States v. Symonds (31) a lieutenant in the navy sued the United States to recover the difference between pay for shore and sea-duty as absolutely fixed by § 1556 of the revised statutes. The reason that only land pay had been allowed him was that the order of the secretary of the navy of July 7, 1882, without modifying

(31) 120 U. S. 46.

the previous order that Symonds should perform the duties of executive officer of the New Hampshire, declared that the ship would not be considered as in commission for sea service after August 1, 1882. But the court held it of no consequence that the New Hampshire was not, during the period in question, in such condition that she could be safely taken out to sea beyond the mainland, that it was sea-duty and that accordingly Symonds had a right to sea-pay, notwithstanding the secretary's order. And in speaking of the navy regulations of 1876 the court remarked: "The authority of the secretary to issue orders, regulations and instructions, with the approval of the President, in reference to matters connected with the naval establishment, is subject to the condition necessarily implied that they must be consistent with the statutes which have been enacted by Congress in reference to the navy. He may, with the approval of the President, establish regulations in execution of, or supplementary to, but not in conflict with, the statutes, defining his powers or conferring rights upon others."

Section 4. Administrative Control.

§ 94. Direction of officers. As we have seen (§ 55, above), the state courts have not considered the responsibility for the enforcement of the laws generally to lie with the governor and so have denied him the right of removal. As we have also seen (§ 61, above), however, the practice of the Federal government has been different from that of the states in this regard, and with the power or removal has gone the power of direction. It was the refusal of Secretary of the Treasury Duane to withdraw

the government deposits from the United States bank that caused President Jackson to remove him.

Thus the right of direction, now a fundamental principle of our national administration, seems to have sprung from the right of removal, but it does not follow from this, now that the right of direction has come to be recognized, that its only means of enforcement is the right of removal. In United States v. Black (32) appeal had been made from the decision of the commissioner of pensions to the secretary of the interior, but the former had refused to carry out the latter's decision and mandamus was asked to compel him to do so. The commissioners suggested that there were other effectual remedies, such as a suit for damages or an exercise of the power of removal, so that it was not a proper case for mandamus, but the court did not concur in this view. It said: "A suit for damages, if it could be maintained, would be an uncertain, tedious and ineffectual remedy, attended with many contingencies, and burdened with onerous expenses. Removal from office would be still more unsatisfactory. It would depend on the arbitrary discretion of the President, or other appointing power, and is not such a remedy as a citizen of the United States is entitled to demand. We think that the case suggested by the petition is one in which it would be proper for the court to interfere by mandamus."

§ 95. **Same: Statutory qualifications of this.** But it is not true that the head of a department has the right of direction over all matters attached to his department.

(32) 128 U. S. 40.

Thus in Butterworth v. United States (33) mandamus had been asked against the commissioner of patents to compel him to grant a patent to R. Hoe & Co. in accordance with a decision of the secretary of the interior which reversed that of the commissioner, but the Supreme Court of the United States denied the right of the secretary to review the action of the commissioner in a case of this kind. It said: "In reference to this argument from the analogy of the general relations of the heads of executive departments to their bureau officers, it may be observed in this connection that, although not without force, it will be very apt to mislead unless particular regard is had to the nature of the duties entrusted to the several bureaus, and critical attention is given to the language of the statutes defining the jurisdiction of the chief and his subordinates, and the special relation of subordination between them respectively; for it will be found, on a careful examination too extensive and minute to be entered upon here, that the general relation between them of superior and inferior is varied by the most diverse provisions, so that in respect to some bureaus the connection with the department seems almost clerical and one of mere obedience to direction, while in others the action of the officer, although a subordinate, is entirely independent, and, so far as executive control is concerned, conclusive and irreversible." In these cases Congress had given a right of appeal from the commissioner to the supreme court of the District of Columbia, and the court said: "The conclusion cannot be resisted that, to whatever else supervision and direction on the part of the head of the department may extend

(33) 112 U. S. 50.

in respect to matters purely administrative and executive, they do not extend to a review of the action of the commissioner of patents in those cases in which, by law, he is appointed to exercise his discretion judicially. It is not consistent with the idea of a judicial action that it should be subject to the direction of a superior, in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates. Such a subjection takes from it the quality of a judicial act."

§ 96. **Right of appeal.** Right of appeal ordinarily, however, lies to the head of the department but not beyond. Thus on receipt of an appeal of the members of Congress from the state of Rhode Island from a decision of the commissioner of the general land office, President Lincoln referred the matter of the right of appeal to him to the attorney-general, and the latter gave it as his opinion (34) that it was by no means the duty of the President to hear appeals from the various departments, though he might exercise his discretion in doing so, but that at any rate the President ought not to entertain appeals from inferior tribunals which should ordinarily be made to the heads of the departments. Where the matter was one that touched the authority of the register and receiver to take final action, without appeal to the commissioner of the land office or the secretary of the interior, however, the attorney-general advised the President that he might properly entertain an appeal from the secretary of the interior (35).

(34) 10 Op. Atty.-Gen. 463.

(35) 15 Op. Atty.-Gen. 94.

CHAPTER V.

MODES OF OFFICIAL PROCEDURE.

Section 1. Board Action.

§ 97. **Action of majority sufficient.** The general law with regard to board action is well stated by Chief Justice Shaw in Williams v. School District (1) as follows: "Another exception was taken, that the assessment was made by two only of the three assessors. It appears by the case that the other assessor received notice and was requested to act with them, but refused to do so. Where a body or board of officers is constituted by law to perform a trust for the public, or to execute a power or perform a duty prescribed by law, it is not necessary that all should concur in the act done. The act of the majority is the act of the body. And where all have due notice of the time and place of meeting, in the manner prescribed by law, if so prescribed, or by the rules and regulations of the body itself, if there be any, otherwise if reasonable notice is given; and no practice or unfair means are used to prevent all from attending and participating in the proceeding it is no objection that all the members do not attend, if there be a quorum. In the present case, all three having had notice and an opportunity to act, the act of two is sufficient."

(1) 21 Pick. 75.

§ 98. **Irregular action of majority.** In the case of McCortle v. Bates (2) a majority of the board of education signed an agreement requesting one Wachob to supply the town clerk with certain articles, agreeing to pay for the same, and at the same time directing the town clerk to issue an order on the township for the payment of the articles, and requesting him to call a town meeting at which they agreed to ratify the contract. They were later sued on the contract and the court held it void and said: "The board is constituted by statute a body politic and corporate in law, and as such is invested with certain corporate powers and charged with the performance of certain public duties. These powers are to be exercised, and these duties discharged, in the mode prescribed by law. The members composing the board have no power to act as a board except when together in session. They then act as a body or unit. The statute requires the clerk to record, in a book to be provided for that purpose, all their official proceedings. They have, in their corporate capacity, the title, care and custody of all school property within their jurisdiction and are invested with full power to control the same in such manner as they think will best subserve the interest of the common schools and the cause of education. They are required to prescribe rules and regulations for the government of all common schools within the township. Clothed with such powers and charged with such responsibilities, it will not be permitted to them to make any agreement among themselves, or with others, by which their public action is

(2) 29 Oh. St. 419.

to be, or may be, restrained or embarrassed, or its freedom in any wise affected or impaired. The public, for whom they act, have the right to their best judgment after free and full discussion and consultation among themselves of and upon the public matters intrusted to them in the session provided by the statute. This cannot be when the members by pre-engagement, are under contract to pursue a certain line of argument or action, whether the same will be conducive to the public good or not."

SECTION 2. JUDICIAL PROCESS.

§ 99. **Criminal proceedings.** Where it is possible to do so it is often desirable to put the law in the form of simple, direct commands, with a penalty attached for their violation. Penalties are thus often attached to much legislation of a governmental character which we do not associate with the penal codes. In these cases the principal work of the administration is the prosecution of the offenders. Often the penalties take the form of imprisonment and fine. In some cases the penalty may consist in the forfeiture of the property concerned in the illicit transaction, and it is generally considered that forfeiture may result only from a judicial proceeding where, in the case of a criminal prosecution, the defendant ordinarily is entitled to a trial by jury, and in the case of proceedings in rem in admiralty courts he is entitled to the privileges peculiar to those proceedings. There is a sharp distinction made by the courts between the forfeiture of property and the abatement of a nuisance, and it is clear that the latter does not require previous judicial process. Equity is frequently resorted to, however, in the abatement of nuisances and, as in other equitable actions, no

jury is necessary. The equitable action has largely supplanted the old criminal prosecution for the maintenance of a nuisance, wherein it was often ordered as a part of the judgment that the nuisance be abated.

§ 100. **Mandamus, commitment for contempt, etc.** We have already seen that courts may be called upon to compel subordinates to carry out the decrees of their superiors (§ 94, above), and this is only one instance of the innumerable ways in which the courts compel officers to perform ministerial duties. We have also seen that bodies like the interstate commerce commission may be authorized to call on the courts to punish for contempt in not answering proper questions (§ 82, above).

§ 101. **Equitable proceedings.** The growing tendency to make use of the injunction in the abatement of nuisances has just been noticed and legislatures, in creating statutory nuisances, have apparently largely depended on the injunction as the means of enforcement. A use of the injunction deemed by the courts analogous to the abatement of nuisances has been the suppression of illegal strikes, lockouts, etc., where business interests generally have been affected. The frequent use of the injunction in these cases has been largely the cause of the cry of "government by injunction."

§ 102. **Condemnation and miscellaneous proceedings.** It is customary to resort to the courts in condemnation proceedings and in a thousand and one ways where administrative officials wish their orders enforced. "Indeed, it may be said that, with a few exceptions, in the absence of a statute providing for summary methods of

procedure, resort must be had to the courts in order to enforce the will of the state as expressed in the administrative law'' (3).

Section 3. Quasi-Judicial Proceedings.

§ 103. **In general.** Administrative powers may be classified as ministerial, discretionary and quasi-judicial. Ministerial powers are those requiring the exercise of little judgment in carrying out and may be enforced by mandamus. Discretionary powers are those requiring shrewdness and foresight. In local affairs they may be said, as a rule, to require ''good business ability,'' in national affairs the quality of statesmanship. Quasi-judicial powers are more akin to those of the judge, and involve the weighing of evidence and the determination thereupon of facts such as the value of land or the domicile of one of an alien race. It is but natural that the likeness between these administrative functions and those of the judge should have caused the courts to apply to their exercise some at least of the rules applicable to regular judicial proceedings, and this they have done to a very large extent in the requirement of a hearing to the party affected.

In regular judicial proceedings previous notice and an opportunity to be heard are so important that their absence goes to the jurisdiction of the court, rendering its action null and void and open to attack in collateral proceedings. Administrative proceedings require more haste than judicial proceedings, so that a previous notice would often render the exercise of the power inefficient,

(3) Goodnow, Admin. Law of U. S., 354.

as in the abatement of nuisances; but it has come to be quite a general rule that where administrative proceedings are of a quasi-judicial nature they must at some stage allow an opportunity to be heard on the question of fact decided, or they will be subject to collateral attack in the courts where the judiciary will review the question of fact decided. This opportunity to be heard may be before the administrative body, or before some court where judicial process is necessary to carry out the decision of the administrative tribunal. If opportunity to be heard in these quasi-judicial matters is not given at some stage, the administrative action will come under the ban of the clauses of the Federal Constitution which require that no person shall be deprived of life, liberty, or property without due process of law. Compare the article on Constitutional Law, §§ 135, 137, in Volume XII of this work. These quasi-judicial functions extend over a wide range of governmental activity. In the United States government alone they are to be found in the land office, in the patent office, in the pension bureau, in the customs service and in numerous other branches. All that will be done here will be to consider them with regard to the assessment of real estate, the exclusion of Chinese, the abatement of nuisances and the regulation of rates.

§ 104. **Assessment of real estate.** In the case of Stuart v. Palmer (4) action was brought by the plaintiff to vacate an assessment upon his lands as a cloud upon title, on the ground that the special assessment proceedings for local improvements in which the assessment had

(4) 74 N. Y. 183.

been made were null and void. The judge said: "I am of the opinion that the constitution sanctions no law imposing such an assessment, without a notice to, and a hearing or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority be done. The legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice." Where the legislature apportions the expense according to the front-foot or some more or less arbitrary rule, however, the quasi-judicial function of the administrative authority is supplanted by the ministerial function of dividing the total cost by the number of front feet, and so this principle of notice in case of the exercise of quasi-judicial powers does not operate. Even in that case, however, if the rule works an injustice in a particular case the injured party may get relief in equity, but on the principle that due process of law requires that proceedings whereby a person is deprived of life, liberty, and property should not be arbitrary and oppressive.

§ 105. **Exclusion of Chinese.** The procedure which was upheld as due process in United States v. Ju Toy (5)

(5) 198 U. S. 253.

is thus described by Mr. Justice Brewer in his dissenting opinion: "It will be seen that under these rules it is the duty of the immigration officer to prevent communication with the Chinese seeking to land by any one except his own officers. He is to conduct a private examination, with only the witnesses present whom he may designate. His counsel, if under the circumstances the Chinaman has been able to procure one, is permitted to look at the testimony but not to make a copy of it. He must give notice of appeal, if he wishes one, within two days, and within three days thereafter the record is to be sent to the secretary at Washington; and every doubtful question is to be settled in favor of the government. No provision is made for summoning witnesses from a distance or for taking depositions, and if, for instance, the person landing at San Francisco was born and brought up in Ohio, it may well be that he would be powerless to find any testimony in San Francisco to prove his citizenship. If he does not happen to have money he must go without testimony, and when the papers are sent to Washington, three thousand miles away from the port which in this case was the place of landing, he may not have the means of employing counsel to present his case to the secretary." As we have seen, however, it was held that under this very hasty procedure, the secretary might pass finally on the fact of citizenship (§ 84, above). It is necessary to bear in mind, however, that the above statement of the procedure is made by one who thoroughly disliked it so that the statement gives the case against the procedure without giving the case for it. See the article on Constitutional Law, § 138, in Volume XII of this work.

§ 106. Determination of fact of nuisance. Some of the courts have been inclined to consider the ascertainment of the fact of nuisance a quasi-judicial question. Where this has been so, it has followed that they have refused to allow the summary determination of the health authorities as to the fact of nuisance to be final. Even where notice has been allowed, however, some of the courts have been inclined to say that there must be a nuisance in fact to give jurisdiction to the health authorities; that, as the existence of this fact is a prerequisite to jurisdiction, it can not be finally determined by the body claiming the jurisdiction even with notice; and that consequently the matter may be reviewed in the courts. Compare § 75, above.

§ 107. Regulation of rates. In the case of Chicago etc. Railway Co. v. Minnesota (6) the Minnesota legislature had organized a commission for the fixing of reasonable railroad rates and had provided for the enforcement of the rates by mandamus. In the case at hand the Minnesota courts had held that the intention of the statute was to make the decision of the commission final as to the reasonableness of the rates, and that in the mandamus proceedings to compel their enforcement the railroad could not introduce evidence to show that the rates would be unreasonable. But the Supreme Court of the United States held that this question of the reasonableness of rates was one judicial in character, that therefore it required a hearing at some stage before the decision became binding, and that if the state law did not allow

(6) 134 U. S. 418.

such hearing, as determined by the court below, it was unconstitutional. Mr. Justice Bradley wrote a dissenting opinion, in which two of the other judges concurred, in which he claimed that notice to be heard on the reasonableness of the charges was not necessary, as the function of the board in determining the reasonableness of the rate had been of a political and not of a judicial nature. Much has happened since Mr. Justice Bradley thus dissented to support the view that the reasonableness of a rate is not to be determined by merely weighing evidence, as in a question of value, but that to judge of it in advance is rather a matter of business foresight. Accordingly it is coming to be the general rule that judges will not decide this question in advance, if there can be any doubt, but will give a rate measure time to operate, and then, on the basis of experience, decide whether it will yield a fair return.

Section 4. Summary Process.

§ 108. Certain summary proceedings historically justified. In the famous case of Murray v. Hoboken Land and Improvement Co. (7) the validity of a sale of land was called in question which had been made under a warrant issued by the solicitor of the treasury against a defaulting collector of customs. No action had been brought against the collector, no notice had been given him or opportunity to be heard, but the balance against him had been determined by the accounting officers of the treasury and the warrant issued. The action was upheld upon historical grounds, fully set forth in Constitu-

(7) 18 How. 272.

tional Law, § 133, in Volume XII of this work. Similarly, the persons of delinquent taxpayers may be summarily arrested without a resort to the courts (8).

§ 109. Abatement of nuisances. It is frequently the case that nuisances must be abated without notice to the owners, and, as we have seen (§§ 75, 106, above), some of the courts in the interest of efficient service hold that the determination of the health authorities is final as to the fact of nuisance; while the greater number hold either that the fact of nuisance is a jurisdictional fact which cannot be passed on finally by the health authorities, or that the determination of the fact of nuisance is a quasi-judicial function and on that account requires a hearing at least before some administrative tribunal. But even if there is a nuisance it must not be abated in such a manner as to cause more damage than necessary. Thus in Barclay v. Commonwealth (9), where the defendant had been convicted of maintaining a nuisance in putting hay and other farm products in a certain barn, and in keeping horses about the barn and feeding them with the hay in the yard adjacent thereto near certain springs, the court held that an order for the removal of the barn was improper. It said: "Where an erection or structure itself constitutes a nuisance, and when it is put up in a public street, its demolition or removal is necessary, but where the offense consists in the wrongful use of a building, harmless of itself, the remedy is to stop such use, not to tear down or remove the building itself." But where an

(8) Comm. v. Byrne, 20 Gratt. (Va.) 165; Palmer v. McMahon, 133 U. S. 660, 668ff.

(9) 25 Pa. St. 503.

article of small value is put to a use which makes it for the time being a nuisance, although not inherently so, it may be destroyed by summary process (10). See the article on Constitutional Law, § 134, in Volume XII of this work.

(10) Lawton v. Steele, 152 U. S. 133.

CHAPTER VI.

OFFICIAL RIGHTS AND LIABILITIES.

SECTION 1. RIGHTS TO OFFICE AND COMPENSATION.

§ 110. Remedies to obtain and keep office. Although the right to an office is not contractual, nor property, yet it is substantial. The three great remedies an officer has are quo warranto, mandamus and certiorari. These are treated in the article on Extraordinary Remedies elsewhere in this volume; but it may be said briefly that quo warranto tries title to office and ousts the de facto officer or usurper; mandamus compels the delivery of the books, papers, and other property pertaining to the office where the title is clear; and certiorari reviews proceedings for the removal of officers for cause. There are also numerous statutory remedies which in some states have supplanted these common law remedies, and in some states the usurping of office is punished as a crime.

§ 111. Rights pending contest. Commission or certificate of election is prima facie evidence of title, and pending a contest the holder thereof is entitled to the possession of the office; but, at least where the court is authorized to decide who the rightful holder of the office is, the holder of the judgment becomes the prima facie holder of the office with the same rights pending the appeal (1).

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(1) Allen v. Robinson, 17 Minn. 113.

§ 112. **Right to compensation is created by law.** The right to compensation depends on the law relating to the office. If the law does not provide for it no compensation can be recovered, irrespective of the value of the work done. Thus in White v. Inhabitants of Levant (2) it was held that a town agent could not recover compensation as none had been provided for. So in Locke v. City of Central (3), where a city surveyor had been allowed certain fees from parties at whose request certain work should be done and was required to perform such other duties as the council might require, it was held that he could not recover compensation for the performance of those other duties, although they had been more onerous than usual because of a great fire and although former surveyors might have been paid irrespective of the ordinance. On the other hand recovery of the salary provided by law can be had notwithstanding the non-performance of duties. Thus in O'Leary v. Board of Education (4) the plaintiff had not been able to render service for eleven months on account of trouble with his eyes and was finally discharged, but the court held that he could recover the salary for the five months prior to the discharge.

§ 113. **Amount determined by law.** In the case of Converse v. United States (5) a collector of customs sued for certain commissions for services rendered in purchasing articles for lighthouse purposes and the

(2) 78 Me. 568.
(3) 4 Colo. 65.
(4) 93 N. Y. 1.
(5) 21 How. 463.

court held, as the purchase of these articles within their districts was one of the duties that the secretary of the treasury was authorized by law to impose on the collectors, that, if the claim were for the purchase of articles within the district, the collector was not entitled to more than his salary as such. Nor is an agreement valid fixing the compensation at less than the law allows. Thus, in Kehn v. New York (6) the rate of pay of firemen at the capitol had been fixed by the statute at three dollars per day and it was claimed that the plaintiff had agreed to accept half that amount, but the court said that even if there had been such an agreement it would not affect the plaintiff's right to the full salary.

§ 114. **Double pay.** Where the offices are not incompatible, there is no objection to double pay in absence of an express restriction. Thus, in the case of Converse v. United States cited in the preceding subsection, the court held that while it was impossible for a collector of customs to receive additional compensation for the purchase of lighthouse supplies in his own district, as that was a duty which might properly be required of him as incident to his office, yet there was no objection to his also being agent for the purchase of these supplies outside his district, and in such a case might collect the fees prescribed for the same as well as his salary as collector. And in the case of United States v. Saunders (7) it was held that the claimant might recover salary as clerk of the committee on commerce of the house of representa-

(6) 93 N. Y. 291.
(7) 120 U. S. 126.

tives, notwithstanding that at the same time he had been clerk in the office of the President of the United States and had received the salary for the same.

§ 115. **Inapplicability of contractual principles.** That the official relation is not contractual is illustrated by Fitzsimmons v. Brooklyn (8). In that case the plaintiff, who was a policeman, had sued to recover his salary during a wrongful suspension, and it was urged that his earnings in the meantime should be deducted, but the court said that the rule sought to be applied was one finding its usual application in cases of master and servant and landlord and tenant, where the injured party is required to make the loss as small as he reasonably can, but that as the official relation was not contractual the rule had no application in the case at hand. In Bliss v. Lawrence (9) it was held that the assignment of salary in advance was contrary to public policy and void; and in Buchanan v. Alexander (10) that the attachment of salary in the hands of a disbursing office was invalid.

§ 116. **Legislative change of salary.** Where there is no express constitutional provision to the contrary future salary may be increased, lowered, or abolished by the legislature, as we have already seen (§ 4, above), but the courts do not favor a change. Thus in United States v. Langston (11) the salary of the minister to Hayti had been fixed at the time the petitioner entered office in 1877 at $7,500 a year, but in the appropriation act of July 1,

(8) 102 N. Y. 536.
(9) 58 N. Y. 442.
(10) 4 How. 20.
(11) 118 U. S. 389.

1882, only $5,000 was appropriated for that office, and, in accordance with the provision of the act that the secretary of state should estimate the entire amount required for the support of the diplomatic and consular service, specifying the compensation deemed advisable in each case, the secretary had in the following year estimated $5,000 as the salary for the minister to Hayti, and for the following years the appropriation was for that amount. But the Supreme Court said that while, if the appropriation had been expressly "in full compensation" for the service of those years, the case would have been distinguishable, and while the case was not free from difficulty, yet it was of the opinion "that according to the settled rules of interpretation, a statute fixing the annual salary of a public officer at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly or by clear implication modified or repealed the previous law."

§ 117. **Accrued pay.** Although neither the official relation nor the right to compensation pertaining thereto is contractual, there is an implied contract to pay salary that has already accrued which is protected by the United States Constitution. Thus in Fisk v. Jefferson Police Jury (12) the plaintiff had been a district attorney in Louisiana and obtained judgments rendered for services as such, but subsequent to the time the services were per-

(12) 116 U. S. 131.

formed the state constitution had decreased the taxing power of the municipality, and the supreme court of the state held that the plaintiff had only a right to the decreased taxing power and not to that which existed at the time the services were performed, on the ground that the plaintiff's right to the accrued salary was not a contract, so that the rule that the obligation of a contract includes the obligation of not decreasing the taxing power with regard to that contract would not apply. The Supreme Court of the United States, however, held that there was a clear distinction between the right to continued salary and that to accrued salary, and that the obligation of the latter is "perfect, and rests on the remedies which the law then gives for its enforcement." Similarly it has been held that accrued salary may be assigned.

§ 118. **Payment to de facto officers.** An exception arises, to the principle that the de jure officer is entitled to the salary fixed by law, in the case where payment has been made to a de facto officer. Thus in Dolan v. Mayor (13) the plaintiff had been assistant clerk of the district court when one Keating entered upon the office and continued to exclude the plaintiff until he himself was ousted by the courts. During part of the period while he occupied the office, Keating was paid the salary belonging thereto and it was claimed that this was a good defense to the action of the plaintiff for the same salary. This claim the court upheld. It said that Keating had been a de facto though not a de jure officer, that it was well settled in New York that a de facto officer could not re-

(13) 68 N. Y. 274.

cover the salary of the office in a judicial proceeding as it was proper to put the title to the office in issue, but the it would be placing too great a burden on the disbursing officer if he should have to go behind the certificate of election or the commission of the actual holder of the office and would impair the efficiency of the public service. So the court denied the right of the plaintiff to recover from the city salary already paid to the de facto officer, but intimated that he might recover it from the latter; and in the case of Nichols v. MacLean (14) the de jure officer in fact recovered judgment from the de facto officer for the salary paid the latter.

§ 119. **Reimbursement.** In the case of United States v. Flanders (15) suit was brought by the United States on the bond of a collector of internal revenue on the ground that he had not turned over certain public moneys. The answer set up that among other credits the collector had been entitled to $777 on account of money paid by him for necessary and legal advertising, and the court upheld this contention. It said that the statute required the advertisements, that there was nothing in it which implied that they were to be paid for out of the compensation allowed the collector, or that they were not to be reimbursed because they were not specified with stationery and blank books, the reimbursement for which was specifically provided for, and that the defendants were in equity and justice entitled to the set-off. So it would seem that an officer is entitled to indemnity when he acts

(14) 101 N. Y. 526.
(15) 112 U. S. 88.

in good faith, and at any rate the public has power to indemnify him (16).

§ 120. **Military and naval pensions.** The grant of military and naval pensions has long been the custom of the United States government and their constitutionality is not subject to question. But "no pensioner has a vested legal right to his pension. Pensions are the bounty of the government which Congress has the right to give, withhold, distribute, or recall, at its discretion" (17).

§ 121. **Civil pensions.** In this country civil pensions are a comparatively new thing, and the courts are as yet feeling their way as to the constitutionality of some of the schemes proposed. Thus it was held in Matter of Mahon (18) that the payment of pensions to those already out of the service was contrary to the provisions of the state constitution forbidding the appropriation of public money as a mere gratuity; and in State v. Rogers (19) it was held that it was beyond the powers of the board of education of Minneapolis to exact one per cent. of their salaries from teachers under the form of contract for the establishment of a pension fund. It was also the dictum of a majority of the court in Hibbard v. State (20) that an act of the legislature requiring a deduction from teachers' salaries for the establishment of a pension fund, either violated the provision of the state constitution requiring uniformity of taxation, or was a taking of private

(16) Mechem, Public Officers, secs. 878, 879.
(17) United States v. Teller, 107 U. S. 64.
(18) 171 N. Y. 263.
(19) 87 Minn. 130.
(20) 65 Oh. St. 574.

property from one citizen for the benefit of another, without his consent and against his will. But the Supreme Court of the United States in Pennie v. Reis (21) took a different view of the nature of these deductions from officers' salaries and held that the amount deducted never became private property, although the rule in the particular case seemed a hard one. In that case, two dollars a month had been deducted from the salary of Ward, a deceased policeman, from April 1, 1878 to and including the month of March, 1889, making a total amount of $264, for the benefit of a pension fund from which, the law provided, a thousand dollars should be paid each member of the force dying after June 1, 1878. Ward died March 13, 1889, but nine days earlier an act had been passed entirely changing the pension regulations. His administrator claimed the thousand dollars, but the United States Supreme Court said that although in the form of a deduction from the officer's salary, the two dollars retained each month by the authorities never ceased to be public property and subject to the "disposal of the government until by the happening of one of the events stated—the resignation, dismissal, or death of the officer—the right to the specific sum promised became vested in the officer or his representative."

Section 2. Liability of Government for Acts of Officers.

§ 122. **In general.** It was a principle of the common law that the king could do no wrong so that he was not subject to action in the courts. See the article on Consti-

(21) 132 U. S. 464.

tutional Law, § 368, in Volume XII of this work. Relief against him took the more humble form of a petition of right, which was referred as a matter of course to the home secretary, whose decision was generally conclusive. The principle underlying the common law rule is not one peculiar to the common law, however, and finds expression in the universally recognized rule that the sovereign cannot be sued without its own consent. In Continental countries, however, a distinction is made between the sovereign and the fiscus, and in the guise of the latter the governments recognize a very extended liability in contract and even tort, and it is generally true that the rule with regard to the sovereign is not applied to municipal corporations or quasi-municipal bodies such as counties and towns, except in those cases where the latter are acting in a special sense as agents of the general government. See the article on Municipal Corporations, §§ 38, ff. elsewhere in this volume. In this country the petition of right ceased on our rupture with England and for a long time the only means of relief against the general government, either of the states or the United States, was through a special act of the legislature. By gradual steps, however, a court of claims was established for the United States, whose decisions have the force of judgments of ordinary courts, and this example had been followed to some extent in the states.

§ 123. **Set-off allowed in Federal courts.** But it has become a well-settled principle in the United States courts that when the United States brings suit, and thus invokes the aid of its courts, it consents to the presentation of any set-offs, legal or equitable, that the defendant may

have, to the extent of the demand made or property claimed by the United States, but not so far as to allow any affirmative relief against it. Application of this principle was made in the case of The Siren (22) where a steamer attempting to violate the blockade at Charleston was seized as prize and ordered to Boston for condemnation. While passing through Hell Gate, near New York, she ran into and sank another vessel and on her condemnation as prize the owner of the sunken vessel asserted a claim upon the proceeds of the sale for the damage sustained by the collision. The case came before the Supreme Court of the United States and it was admitted by the court that the exemption of the sovereign included exemption of its property, but that when it came into court, as it had here, for the condemnation of the vessel that opened to consideration all claims and equities in regard to the property involved. They held that the mere fact that this claim for damages would not have been enforceable against the vessel if the United States had not brought it into court, did not prevent its recognition by the court when the United States had done so.

§ 124. **Statutory relief.** For affirmative relief directly against the United States it is necessary to turn to the court of claims legislation. This was under review in the case of Dooley v. United States (23). In that case suit was brought against the United States to recover back certain duties paid under protest in Porto Rico on goods shipped from New York, on the ground of the occupation and subsequent acquisition of Porto Rico by the United States.

(22) 7 Wall. 152.
(23) 182 U. S. 222.

Suit was brought in the circuit court under a provision of the Tucker act making the circuit and district courts courts of claims up to a certain amount. The court said that the first section of that act evidently contemplated "four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort.* The words 'not sounding in tort' are in terms referable only to the fourth class of cases." The court said that, while it had previously held that for goods not imported at all a common law action might be had against the collector to recover the money back, that remedy was not exclusive, and that the case also came within the first class of cases above mentioned as being founded on a revenue law. It was urged, however, that there was an element of tort in the wrongful exaction of duties, but the court said that, even conceding this for the purposes of the case, the restriction as to cases not sounding in tort applied only to the fourth class of cases and that an element of tort would not therefore be fatal to a case brought under a law of the United States. If the court had cared to, however, it could well have brought the case within the third class, on the ground that the wrongful exaction of the duty raised an implied promise (quasi-contract) to pay it back and that the injured party was at liberty to waive the tort and sue in contract. This is a principle that has found wide application in cases against the United States. For instance, where the

United States had occupied property without claim of title, it was held that there was an implied promise of compensation and that the tort could be waived and suit brought in contract (24).

§ 125. **Suits in which the government is the real party in interest: Suits between states.** The exemption of the states and of the United States from suit, except in the cases expressly provided by the Constitution and those cases where they have waived their exemption, is not confined to cases where the state or the United States are directly made parties defendant. It applies to all cases of suits to compel officers to discharge purely official duties owed on behalf of the government. See the article on Constitutional Law, §§ 374-78, in Volume XII of this work. Suits between states, or between states and the United States are also dealt with in that article, §§ 361-62, 371.

Section 3. Liability of Officers.

§ 126. **Criminal liability.** Officers are subject to a very wide criminal responsibility for failure to perform ministerial duties and for the corrupt or malicious performance of discretionary duties, and the common law liability has been supplemented extensively by statute. The control which the public prosecutor has over criminal prosecutions in this country, however, often renders the criminal liability of officers difficult of enforcement.

§ 127. **Liability in contract.** Public officers are less likely than private agents to be considered as parties to contracts so as to bind themselves personally, and yet in

(24) United States v. Great Falls Mfg. Co., 112 U. S. 645.

the case of Brown v. Bradlee (25) where three selectmen had offered a reward of twenty-five hunderd dollars for the furnishing of certain evidence, the selectmen were held personally liable. The offer of a reward was signed by the selectmen with the words "Selectmen of Milton" after their signatures, and the court said that if the offer had been authorized, its form was sufficient to bind the town, but that that did not preclude the liability of the officers also, and applied much of the reasoning used in ordinary cases of agency. It said that the lack of authority was a reason for reading the words of the contract as directed against the officers themselves, where the construction of the contract was doubtful. Contracts relative to office are often void and thus unenforceable against the officer. Thus in Robertson v. Robinson (26) where a candidate for tax assessor had agreed to appoint another his chief deputy and pay him from the fees of the office twenty-five hundred dollars, if the latter would perform practically all the duties of the office and make his official bond, it was held that the agreement was void as amounting to a sale of the office.

§ 128. **Civil liability of judges.** In the case of Bradley v. Fisher (27) a justice of the supreme court of the District of Columbia had ordered the name of the plaintiff stricken from the roll of the attorneys practicing in that court, because the latter had threatened the judge with personal chastisement. The attorney claimed that the action of the judge in disbarring him was malicious

(25) 156 Mass. 28.
(26) 65 Ala. 610.
(27) 13 Wall. 335.

and brought suit, but the court said: "Judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter. When there is clearly no jurisdiction over the subject matter, any authority exercised is an usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of the determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of the estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority." In the case at hand the court held that the order of disbarment was irregular in that the attorney had not been cited, but that within the above principles the judge could not be held liable.

§ 129. **Civil liability of heads of departments.** In Spalding v. Vilas (28) the supreme court of the United States held that the foregoing rules applicable to judges of courts of superior jurisdiction applied to a large extent also "to official communications made by heads of executive departments when engaged in the discharge of duties imposed upon them by law."

§ 130. **Civil liability of ministerial officers.** In the case of Tracy v. Swartwout (29) a collector of customs had refused to allow the entry of certain goods without the payment of a duty, which the supreme court of the United States decided was not the correct duty but was higher than the law allowed, and, as a result of the detention of the goods for the nonpayment of the higher rate, the goods were damaged and action brought against the collector. It was held that the collector of the customs was a ministerial officer and the court said: "It would be a most dangerous principle to establish that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress." Accordingly the court allowed the plaintiff to recover and said that, as the government in such a case was bound to indemnify the officer, no hardship could result.

§ 131. **Ministerial officers acting under process valid on its face.** In the case of Erskine v. Hohnbach (30) a collector of internal revenue was sued in trespass for the conversion of certain property which he had seized in

(28) 161 U. S. 483.
(29) 10 Peters 80.
(30) 14 Wall. 613.

the enforcement of an assessment chargeable against the plaintiff, duly made by the assessor of the district and certified to him with an order directing its collection. The court held that the defendant was in the same position as a sheriff acting under an execution regular on its face (see the article on Torts, §§ 93-97, in Volume II of this work), and said: "Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process or orders issued to them by tribunals invested by law with authority to pass upon and determine particular facts and render judgment thereon, it is well settled now that if the officer or tribunal possess jurisdiction over the subject matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then, in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process issued."

§ 132. Liability for acts of subordinates. Ordinarily an officer is not liable for the acts of his subordinates. Thus, in Robertson v. Sichel (31), where action was

(31) 127 U. S. 507.

brought against the collector of customs for the loss of a trunk by fire, claimed to be due to the negligence of the subordinate officers of the customs, the court considered the rule to be well settled that he was not liable and said that "competent persons could not be found to fill positions of the kind, if they knew that they would be held liable for all the torts and wrongs committed by a large body of subordinates in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person."

§ 133. **Liability on official bonds.** In the case of People v. Schuyler (32) the question was whether the sheriff and his sureties were liable on his official bond for a trespass committed in taking the goods of a wrong party in an attempt to execute regular process. The court held that while for a purely personal wrong of the sheriff there would be no liability on the bond, yet color of authority would be sufficient to establish liability, and it would not be necessary that there should have been a wrongful action with regard to some act directly commanded by the process. But the sheriff and his sureties are not liable for the breach of a public duty not ministerial in its nature, such as the keeping of the peace (33), and, although the giving of a bond increases the liability of an accounting officer, it does not render him absolutely liable, as he is excused from turning over the funds received by him at least in the case where they have been forcibly taken from him by the public enemy (34).

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(32) 4 N. Y. 173.

(33) South v. Maryland, 18 How. 396.

(34) United States v. Thomas, 15 Wall. 337.

EXTRAORDINARY REMEDIES

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EXTRAORDINARY REMEDIES.

§ 1. Relation of subject to administrative law. For a discussion of the larger topic of Administrative Law, of which Extraordinary Remedies forms a part, see the article on Public Officers, §§ 1-3. elsewhere in this volume.

Section 1. Mandamus.

§ 2. **Origin of remedy.** Mandamus is a product of the court of king's bench of England. In that court, by a well settled legal fiction, the king was supposed to sit in person, and, by right of his prerogative, issue the extraordinary legal remedies, among which the mandamus was one of the most important, where the ordinary legal remedies were so inadequate as to threaten a failure of justice. The supposed presence of the king caused these remedies to be called prerogative writs. As the legal fiction on which the name was based is no longer tenable in this country, the term is now inapt and seldom used. Nevertheless the essential character of the remedy has remained the same. It is still an extraordinary remedy, not issuable unless the ordinary legal remedies are inadequate, and is generally subject to a discretion on the part of the judge not to be found in the case of the ordinary legal remedies.

§ 3. **Object.** The object of mandamus is to compel the performance of a clear, public, legal duty, owed by some person in official or quasi-official position. The duty must be one arising from law and not from contract. Thus, in Bailey v. Oviatt (1) a committee had been appointed from the Vermont legislature to investigate charges that the railroads of the state had improperly influenced legislation, and the committee had employed Oviatt to take and report the testimony produced before them. He had taken down the entire testimony in shorthand, but had failed to transcribe a portion of

(1) 46 Vt. 627.

it, and mandamus was brought against him to compel him to transcribe the residue and deliver it to the committee. The court recognized that he had been guilty of gross violation of duty, but decided that he was a mere employee of the committee and not a public officer; that as such his duties arose from contract and not from law, and were not enforceable by mandamus; and that accordingly the only remedy of the committee was an action for damages for breach of the contract of employment. The court said: "It is true that his failure to discharge his contract duty to them hinders them in the discharge of their public duty, as a committee of investigation, but that does not render his any more a public duty. It simply shows that the committee was very unfortunate in the choice of a servant. Suppose that the defendant, after having contracted to act as clerk and stenographer for the committee but before entering upon the work had refused to act in that capacity, would anyone claim that this court would compel him to perform those services by the writ of mandamus? We think not. No more can it legally issue the writ to compel him to perform what remains unperformed of those services."

But where the law imposes certain duties on an officer it will not be a sufficient answer to a mandamus that the claim which is sought to be enforced arose out of contract. Thus, in People v. Coffey (2) mandamus was allowed against the comptroller of the city of Troy to countersign a warrant in payment of the services of a

(2) 62 Hun, 86.

teacher, where the claim for payment arose out of a contract for employment and not out of the right to a salary attached to a public office. But the duty arose from law and the contract was the mere occasion for its exercise.

§ 4. **Not used to control discretion.** Mandamus will not be used to compel the exercise of authority unless there is a duty to exercise that authority. In such cases the authority is permissive, not mandatory; nor will it be used to control the discretion or judgment of an officer who, although under a duty to act, must exercise discretion or judgment in the performance of the act. In such a case, however, he may be compelled to exercise his discretion or judgment, he may be compelled to take action; though the direction of this action will not be determined by the court. Thus, in State v. Commissioners (3) the county commissioners were impliedly required to act with reasonable promptness in passing upon the sufficiency of the sureties to the official bond of a county recorder-elect, and the court held that it would compel them to take action, though it was for them to say whether or not the sureties were sufficient. That mandamus will not be used to control the judgment of a public officer is illustrated by the case of United States v. Commissioners (4), where it was held that it would not be granted to compel "the issuing of a patent for land, in a case where numerous questions of law and fact arise, some of them depending upon circumstances which rest in parol proof yet to be obtained, and where the exercise

(3) 31 Oh. St. 451.
(4) 5 Wall. 563.

of judicial functions, some of them of a high character, is required."

§ 5. **Absence of other adequate legal remedy necessary.** As an extraordinary remedy, mandamus is only granted when there is no other adequate legal remedy. Thus, in State v. Megown (5) mandamus was asked to compel the probate court to grant certain letters testamentary, but the court said: "Mandamus will not lie in this instance because relator has other and specific remedy by appeal. The existence of such a remedy bars the exercise of jurisdiction by mandamus; for such a writ is not to usurp the functions of a writ of error or appeal, or to correct errors that may be corrected in that way." But the other remedy to be adequate must, as a rule, furnish the same specific relief as mandamus. Thus, an action for damages against the officer refusing to perform his duty has been held not to be adequate relief; and in the case of Trenton Water Power Co. (6), where a mandamus was asked to compel the company to erect a bridge over Delaware street in the city of Trenton, it was held that the fact they were liable to a criminal prosecution if they did not build the bridge was not a sufficient answer to the request for a mandamus, as, although they might be punished by means of the criminal prosecution, it would not necessarily secure the building of the bridge.

§ 6. **Mandamus to public officers.** Mandamus is often used to compel inferior courts and judges to take action

(5) 89 Mo. 156.
(6) 20 N. J. L. 659.

or perform some ministerial duty, and in such cases its use is largely technical and would have little significance to the general reader. The President of the United States is not subject to the writ, as to make him so would be a violation of the equality of the three branches of the government; and on the same reasoning the better opinion is that the governors of the states are not subject to mandamus by the state courts. See Constitutional Law, § 42, in Volume XII of this work. But in the famous case of Marbury v. Madison (7) it was held by Chief Justice Marshall that where the head of a department, such as the secretary of state, has a mere ministerial duty to perform, such as the delivery of a commission, he can be compelled to perform it by mandamus. Although political officers, officers who are likely to change with a change in the administration, are generally subject to the writ when performing ministerial duties, the writ is far oftener used against more strictly administrative officers, as a much larger part of their duties are likely to be ministerial. Thus, the use of the mandamus against auditing and fiscal officers is very common, as also against county boards and officers, sheriffs, clerks of court, and tax officials. Its use against officials of the United States is very limited, as the Federal courts proper have been given little authority by Congress to issue the writ except incidentally, as for instance, where they are attempting to enforce a judgment they have rendered against a municipal corporation. To mandamus a Federal officer in an original proceeding, it is

(7) 1 Cr. 137.

necessary to report to the local courts of the District of Columbia, and this is possible only in the District.

§ 7. **Not to try title to office.** Mandamus may be used to compel the issue of a certificate of election to one entitled thereto on the face of the returns, or in such a case to compel the administration of an oath of office, and it is a customary means of obtaining possession of the books, records, and insignia of office; but, where a person is a de facto officer, a claimant to the office cannot avail himself of any of these means to try the title to the office. Thus, in State v. Williams (8) Williams had been elected treasurer of Lyon county for a term regularly expiring in March, 1878, but prior to that date had been elected a member of the Minnesota house of representatives and had entered upon the duties of that office. The county commissioners had determined that this amounted to a resignation of the office of treasurer, and had appointed one Addison in his place. The latter had brought mandamus to compel the delivery of the records and property of the office. The court distinguished this case from those where there is no de facto officer claiming the office, and the only question is as to who is prima facie entitled to the office. It said:

"In that class of cases—in which the question is who is prima facie entitled to the possession of the records and other property of a given office—the certificate of the auditor, which is conclusive until it is affirmatively overthrown, is properly held prima facie evidence that the person named in it has been elected, and is therefore,

(8) 25 Minn. 340.

if he is duly qualified, entitled to the possession of the records and other property of the office. In that class of cases, the title to the office is not finally adjudicated; but the question of prima facie right is properly regarded as settled by the auditor's certificate. But the case at bar is another thing entirely, because the question of title must be examined and determined against Williams, the incumbent de facto of the office, before the relator's certificate can possess any value whatever. The case, then, is one in which the *title* of the office is directly and unavoidably in controversy, although the action is in form an action, not for the determination of the title, but for the recovery of possession of the records and other property of the office. The case falls, then, within the rule laid down by Mr. High that 'if it be apparent to the court that, instead of a proceeding whose object is only to get possession of the books and insignia of the office, the writ is invoked in reality to test the title to the office, and the question of title is the real point in issue, it will refuse to lend its aid by mandamus. In all such cases, the parties will be left to a determination of the disputed questions of title by proceedings upon information in the nature of a quo warranto, since this is the only remedy by which judgment of ouster can be had against an actual incumbent and the person rightfully entitled can be put into possession of the office. The court will not, therefore, upon an application for a mandamus to procure possession of official papers, inquire into the right of a de facto incumbent of the office; and if it is apparent that the relator's

rights cannot be determined without such an investigation into respondent's title, mandamus will not lie.' "

§ 8. **Mandamus to municipal corporations.** A familiar instance of the use of mandamus against municipal corporations is to compel the levy of a tax to pay a judgment against the corporation. Thus, in United States v. New Orleans (9) judgment had been obtained against the city on its bonds and coupons, and executions issued on the judgments and returned unsatisfied; and it was asked that a mandamus should issue to compel the city to pay the judgment out of any funds in its possession, or to levy a tax for their payment. The city relied on the fact that no express power had been granted the city to levy the tax, but the court said that "when the authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment or the discharge of the obligation accompanies it; and this, too, without any special mention that such power is granted." Accordingly, it was ordered that the mandamus issue.

§ 9. **Mandamus to private corporations performing public duties.** Mandamus is often used to compel public service corporations to perform their duties to the public. Thus, in the case of People v. New York Central R. Co. (10) the railroad company had suspended the operation of its road and gave as its excuse the existence of a strike of its employees for higher wages, not alleged to be accompanied by violence, riot, or other un-

(9) 98 U. S. 381.
(10) 28 Hun. 543.

lawful interference. The attorney-general asked for a mandamus to compel it to resume operation and the appellate court considered the case a proper one for mandamus. It said: "The maintenance and control of most other classes of public highways are so devolved (upon public officers), and the performance of every official duty in respect of them may be compelled by the courts on application of the state, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations in regard to their relation to the state is strong and clear, and so far as it affects the construction and proper and efficient maintenance of their railways will be questioned by no one. It is equally clear, we think, in regard to their duties as carriers of persons and property. This springs sharply out of the exclusive nature of their rights to do these things. On other public highways every person may be his own carrier, or he may hire whomsoever he will to do that service. Between him and such employee a special and personal relation exists, independent of any public duty, and in which the state has no interest. In such a case the carrier has not contracted with the state to assume the duty as a public trust, nor taken the right and power to do it from the state by becoming the special donee and depositary of a trust. A good reason may, therefore, be assigned why the state will not by mandamus enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public highway is the exclusive property of a body corporate, which alone has power to use it in a manner which of necessity requires

that all management, control, and user for the purposes of carriage must be limited to itself, and which, as a condition of the franchise that grants absolute and exclusive power over and user of a public highway, has contracted with the state to accept the duty of carrying all persons and property within the scope of its charter, as a public trust." The court considered that a mere dispute over wages was not sufficient to excuse the non-operation of the road.

§ 10. **Parties to whom the writ is granted.** Where a person has some particular interest or right to be protected, he is a proper party to secure the issue of a mandamus, and in some states he is considered a proper party only in such a case; but the better opinion appears to be that when the performance of the duty affects the public at large it is not necessary for the relator to have any special or peculiar interest in the performance of the duty independent of that of the public at large. Thus, in State v. Francis (11), where a mandamus was sought to compel the board of police commissioners of St. Louis to arrest and prosecute certain named persons for having violated the state law against selling fermented liquors on Sunday, it was held that "where a public right is involved and the object is to enforce a public duty, the people are regarded as the real party, and in such case the relator need not show any legal or special interest in the result. The fact that he is a citizen, and, as such, interested in the execution of the laws is the sesame which unlocks the gates of mandatory

(11) 95 Mo. 44.

authority wherever an officer, whose duties are merely ministerial, refuses to perform his office and thereby causes detriment to the public interest."

SECTION 2. PROHIBITION.

§ 11. **Origin.** Prohibition is another one of the extraordinary legal writs originating in the court of king's bench and there termed prerogative writs (§2, above). It was the counterpart of mandamus, but was used to prevent further action, while mandamus was used to compel action. While mandamus was used against ministerial officers or to force non-ministerial officers to take action, prohibition was used almost, if not quite, exclusively against inferior courts to prevent their usurping authority. Thus, a large part of the instances where the writ was issued in England were cases where the common law courts considered that the ecclesiastical courts were encroaching on their jurisdiction.

§ 12. **Distinguished from injunction.** "Some points of similarity may be noticed between this extraordinary remedial process and the extraordinary remedy of courts of equity by injunction against proceedings at law. Both have one common object, the restraining of legal proceedings, and each is resorted to only when all other remedies for attaining the desired results are unavailing. This vital difference is, however, to be observed between them, that an injunction against proceedings at law is directed only to the parties litigant, without in any manner interfering with the court; while a prohibition is directed to the court itself, commanding it to cease from the exercise of a jurisdiction to which it has no legal claim. An injunction usually recognizes

the jurisdiction of the court in which the proceedings are pending and proceeds on the ground of equities affecting only the parties litigant, while a prohibition strikes at once at the very jurisdiction of the court. The former remedy affects only the parties; the latter is directed against the forum itself'' (12). Of the two, injunction is immeasurably the more important.

§ 13. **Reaches only judicial acts.** The great weight of authority establishes the proposition that prohibition, though it may lie to a tribunal not strictly a court, is to be used only to restrain action judicial in its nature. Thus, in State v. County Court (13) prohibition was asked to restrain the justices of the county court and the commissioners appointed by the court and the contractor from further proceeding in the removal of the seat of justice of the county. The court said: ''The duties of the county court are partly judicial, and in part merely administrative. . . . In the exercise of that portion of their jurisdiction which is judicial in its nature, as in matters of probate, accounts, guardians, minors, lunatics, apprentices, and the like, in which an appeal is allowed to the circuit courts, the county courts are a branch of the judiciary of the state, and as much state courts as the circuit courts. . . . And if the court were exceeding its proper jurisdiction in matters of this kind, or were proceeding judicially upon a misconstruction of a statute involving a question of jurisdiction in any suit pending between parties (though the county might be one of the parties), there is no doubt

(12) High, Extraordinary Legal Remedies, sec. 763.

(13) 41 Mo. 44.

that prohibition might be granted, at the discretion of the court, at the instance of any one of the parties or even of a stranger to the suit. . . . But the office of prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial power and not of ministerial or merely administrative function; and in a case where the court errs on a question of jurisdiction, or in the construction of a statute, in the exercise of such judicial power as an inferior court. It will not lie to restrain a ministerial act, as the issuing of an execution, or the levying of a tax to repair county buildings; . . . nor against ministerial officers, such as tax collectors, commissioners to locate a county seat, or the like; nor to restrain the issuance of a commission by the governor."

§ 14. **Absence of other adequate legal remedy necessary.** As with the other extraordinary remedies, prohibition is only granted where the ordinary legal remedies are inadequate. For instance, it does not ordinarily lie where the usual forms of appeal are available.

Section 3. Quo Warranto.

§ 15. **Origin.** Quo warranto is of very ancient origin, having been used as far back as Richard I against anyone who held any office or franchise of the crown, to inquire by what right he held it and to oust him from the same if he held it without right. It was frequently used against the great nobles and many were the complaints of the encroachments of the crown. Under the Stuarts this remedy was much used against municipal corporations in order to bring them more effectively under the

control of the crown. In the time of Charles I it was unsuccessfully used to forfeit the charter of Massachusetts. The old writ of quo warranto was one of a number of writs of right which were exceedingly technical in their operation; and probably in part for this reason it was early superseded by the information in the nature of a quo warranto, which was a criminal proceeding allowing not only the ousting of the usurper, but his punishment, at least by fine, as well; but although the form of an information is still generally retained in this country, quo warranto is seldom used here to impose a fine and is generally regarded as a civil action.

§ 16. **To try title to office.** Of its use in this country, High says: "It is doubtless due to the comparatively short tenure of most officers in this country, as well as to the method of popular elections which forms the distinctive feature of the American system, that the jurisdiction is more frequently invoked for the determination of disputed questions of title to public office, in this country, than for all other causes combined" (14). Unless some statutory substitute has been provided, quo warranto is the great means of trying title to an elective office where it is desired to go behind the face of the returns. For this purpose it has even been used to try the title of a person occupying the office of governor of a state, where the board of state canvassers had determined that he had received a majority of the votes and a certificate of election had accordingly been issued to him by the secretary of state. This was so in the case of At-

(14) Extraordinary Legal Remedies, sec. 609.

torney General v. Barstow (15). It was claimed, by analogy to the reasoning by which a governor is generally held free from the writ of mandamus, that to allow the writ would be to destroy the equality of the executive; but the court said that a clear distinction was to be made between the office and the person claiming to hold the office, and that the court could "sit, examine and decide upon the rights of contestants to the office of governor, and give judgment against one and for another, without breaking down or disturbing the executive department of the government." The court said it could not know "except by laborious, long-continued and systematic inquiry, all about the votes cast at the last election—whether there were any frauds or mistakes in the canvassing or return of votes that affected or destroyed the right of a person to an office." But quo warranto is not the proper method of trying the title to *legislative* office, as the constitutions make the houses of the legislatures the judges of the qualification and election of their members.

§ 17. **To establish right to office.** Although quo warranto determines the title of the person against whom the action is brought, it did not at common law establish the right to the office of the one in whose interest the action was brought. This followed from the original purpose of the writ, i. e., to oust from office, not to decide an election contest. But this rule has been changed in many of the states, so that in those states the title of the relator is passed on as well as that of the one against

(15) 4 Wis. 567.

whom the action is brought. Where the latter refuses to give up the office on an adverse decision in quo warranto, it may be necessary to bring mandamus to compel the delivery of the records, property, etc., pertaining to the office, as quo warranto will not usurp the functions of mandamus.

§ 18. **To enforce forfeiture of office.** One of the old uses of quo warranto was to enforce forfeiture of office. But the purpose was to declare and enforce a forfeiture, not to remove for cause. Thus, in State v. Wilson (16), an action in the nature of a quo warranto was brought to oust the defendant from the office of mayor of Topeka on the ground of alleged acts and omissions affecting the enforcement of the liquor laws and the laws against bawdy houses and gambling houses. The court said: "If the alleged ground for ousting the officer is that he has forfeited his office by reason of certain acts or omissions on his part, it must then be judicially determined, before the officer is ousted, that these acts or omissions ipso facto and of themselves work a forfeiture of the office. Mere misconduct, if it does not of itself work a forfeiture, is not sufficient. . . . The court has no power to create a forfeiture, and no power to declare a forfeiture where none already exists. The forfeiture must exist in fact before the proceeding in quo warranto is commenced." In the case at hand, however, the court considered the statutes of the state to require a trial and conviction to work a forfeiture, and, as there had been none, held the action premature. In addition, it con-

(16) 30 Kan. 661.

sidered that there were other adequate remedies, by removal or prosecution, which would have made quo warranto improper, even though the action of the mayor had ipso facto forfeited his office.

§ 19. **Against municipal corporations.** In the early English cases of quo warranto, one of its familiar uses was to enforce the forfeiture of charters of municipalities for the wrong doings of their officers. Municipal corporations were considered to a much greater degree than they are with us much like private corporations. The courts in this country, however, have taken the view that municipal charters are not conferred for the benefit of those holding office under the municipality, but for the benefit of the people living within the territory included under the charter. Accordingly they have refused to declare forfeited the charter of a municipality because of the wrongful acts of its officers. Quo warranto is, however, often used to test the legality of the charter itself; but there is difference of opinion as to whether the action should be brought against the corporation in its corporate name, or whether it should be brought against the inhabitants as unlawfully assuming to be a corporation. And, although it may be used to oust a city from exercising a franchise not granted in the charter, it may not be used to oust it from the exercise of every irregular act of power. Thus, in State v. Lyons (17) an information in the nature of a quo warranto was filed asking that the city show by what authority a certain ordinance vacating a certain street in the city was passed. The court said:

(17) 31 Iowa, 432.

"From this it is apparent that the city is clothed with the power to vacate streets, and, therefore, when the council passed the ordinance in question they did not exercise powers not conferred by law. But, at the most which can be made from all the statements of the information, they were exercising a power conferred by law in an improper and irregular manner. The statute does not authorize this proceeding for a mere irregular exercise of a conferred power, although such irregularity may be sufficient, when tested, to vitiate or render void the act done."

§ 20. **Against private corporations.** There are a great number of cases in this country where quo warranto has been used to oust a private corporation from exercising some franchise not authorized by law. Thus in the case of People v. Utica Insurance Co. (18) the company had been doing a business in issuing notes, receiving deposits, making discounts, and transacting other business which incorporated banks might do by virtue of their charters, despite a restraining act of 1804 passed to prevent any unauthorized or unincorporated association from banking. It was claimed that the right of banking was not such a right as could not have been exercised except by grant from the king of England, and that accordingly it was not a franchise, the usurpation of which could have been corrected by quo warranto. But the court said: "Taking it for granted for the present, for the purpose of considering whether the remedy adopted is appropriate, that the defendants have exercised the right of bank-

(18) 15 Johns. (N. Y.) 358.

ing without authority and against the provisions of the restraining act, they have usurped a right which the legislature has enacted should only be exercised and enjoyed by authority derived from them. The right of banking, since the restraining act, is a privilege of immunity subsisting in the hands of citizens by grant of the legislature. The exercise of the right of banking, then, with us, is the assertion of a grant from the legislature to exercise that privilege; and consequently it is the usurpation of a franchise, unless it can be shown that it is a privilege granted by the legislature."

§ 21. **To enforce a forfeiture of charter.** Quo warranto is much more commonly used to enforce the forfeiture of a charter than to enforce the forfeiture of office, although much the same principles apply. In the case of Commonwealth v. Commercial Bank (19) quo warranto was brought to forfeit the bank's franchise for having dealt in promissory notes contrary to the express provisions of its charter, and because of having taken a higher rate of interest than allowed in its charter. The court said: "The question is not whether a single act or series of acts of misuser, through inadvertence or mistake, may work a forfeiture, but whether the constant and wilful violation of these important conditions of the grant produce that effect. Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States in Mumma v. Potomac Company (20), held that a corporation by the very terms and nature of its political ex-

(19) 28 Pa. St. 383.

(20) 8 Pet. 287.

istence is subject to dissolution by forfeiture of its franchise for wilful misuser or non-user. Many years before that decision was pronounced, the same principle was fully recognized by the same high authority in Truett v. Taylor (21), where the right of forfeiture for misuser or non-user was held to be the common law of the land and a tacit condition annexed to the creation of every corporation. It is now settled by numerous authorities that it is a tacit condition of a grant of incorporation that the grantees shall act up to the end or design for which they are incorporated; and hence, through neglect or abuse of its franchise, a corporation may forfeit its charter as for condition broken or for a breach of trust."

§ 22. **To oust foreign corporations from doing business in the state.** In the case of State v. Insurance Co. (22) quo warranto was brought to try the right of the company, a New York corporation, to carry on in Minnesota the business of insurance against three classes of risks, viz., injury or death of persons caused by accident, breach of trust by persons holding places of public or private trust, and the breakage of plate glass. The court said: "A state has the power of a sovereign to prohibit foreign corporations from exercising their franchises, carrying on their ordinary corporate business, within its borders; and when, in defiance of such prohibition and contrary to our law, a foreign corporation does assume to exercise corporate franchises in a manner affecting the public interest, quo warranto will lie for the purposes

(21) 9 Cranch, 43.
(22) 39 Minn. 538.

of determining the right in question and of applying a remedy, although it is true that the courts of a state have no power to affect by their judgments the corporate existence of foreign corporations. We can restrain the exercise, within our own jurisdiction, of corporate franchises inconsistent with our own sovereignty, whether the corporation whose actions are in question be domestic or foreign."

§ 23. **To try title to corporate office.** It does not seem that in England the title to an office created by the charter of an educational institution can be tried in quo warranto (23). The ground the English courts give is that it is not a public office. But most of the courts of this country have followed a different rule. In Commonwealth v. Arrison (24) quo warranto was asked against certain persons exercising the office of "Trustees of the Ninth Presbyterian Church in Philadelphia." The court said: "To establish it as a principle that no information can be granted in cases of what the counsel call private corporations might lead to very serious consequences. Perhaps it may be said that banks, turnpike, canal, and bridge companies, are of a public nature; but yet they have no concern with the government of the country or the administration of justice. They are no further public than as they have to do with the great numbers of persons. But if numbers alone is the criterion, it will be often difficult to distinguish public from private corporations. Let us consider churches, for example: in some,

(23) Regina v. Mousley, 8 Q. B. 946.

(24) 15 S. & R. 127.

the congregation is very numerous, in others very small; how is the court to make the distinction? If you say that the court has the right in both cases to grant or deny the information, according to its opinion of its expediency, there is no difficulty as to the right; but, if it be alleged that there is a right in one case and not the other, the difficulty will be extreme. I strongly incline to the opinion that, in all cases where a charter exists and the question arises concerning the exercise of an office claimed under that charter, the court may, in its discretion, grant leave to file an information; because in all such cases, although it cannot be strictly said that any prerogative or franchise of the commonwealth has been usurped, yet, what is much the same thing, the privilege granted by the commonwealth has been abused."

§ 24. **Against servants of corporations.** But quo warranto will not issue against a mere servant of a corporation, one whose office is not fixed by the charter itself. Thus, in Commonwealth v. Dearborn (25) an information in the nature of a quo warranto was asked against certain persons usurping the office of managers of a lottery granted to the proprietors of Kennebeck bridge, but the court determined "that the defendants, as managers of a lottery granted to a corporation and appointed to the trust by the corporation, were not such officers as were liable to the process which had been instituted in their case. They were the private officers or servants of the corporation and removable by it at pleasure, or at least for good cause."

(25) 15 Mass. 125.

§ 25. **Discretion in granting.** In State v. Leatherman (26) quo warranto was asked by the attorney-general to test the validity of the charter of the town of Arkansas City. The court said that it was universally recognized that the courts had considerable discretion in granting the writ where private persons asked for it, but that several American courts and distinguished jurists had gone a step further and applied this discretion to proceedings on the part of the state herself. It pointed out the evils of overturning a municipal corporation long acquiesced in by the public and concluded that "the state herself may, by long acquiescence and by the continued recognition through her own officers—state and county—of a municipal corporation, be precluded from an information to deprive it of franchises long exercised in accordance with the general law. The case made by the answer shows an acquiescence for nearly nine years, and a recognition by the governor, county court, county clerk, county collector, and the whole of a population now over a thousand. If the answer be true, the corporation of Arkansas City should not now be held null and void."

§ 26. **To whom granted, and interest required.** Information in the nature of a quo warranto is brought in the name of the state, that is, the name of the state appears as the first party in the title of the action, and, when brought by the attorney-general, is allowed as a matter of course, except where, as in the preceding case, long acquiescence of some other reason would create great hardship. It may also be granted to a private person

(26) 38 Ark. 81.

who is called the relator, but it is not granted as a matter of course and the private person must show some interest that will entitle him to have the action brought. Thus, in Commonwealth v. Cluley (27) where quo warranto was asked by the unsuccessful candidate for sheriff of Allegheny county (who had been defeated by almost seven thousand votes), on the ground that Cluley was ineligible to the office, it was held that the relator had no such interest as would entitle him to the action. Even if Cluley were ineligible that would not mean that the relator was elected, as there must be a plurality of votes, and the votes cast for an ineligible candidate are not generally treated as nullities. See Public Officers, § 24, elsewhere in this volume. But in the case of municipal officers it is generally held that any citizen or tax payer has a sufficient interest to entitle him to the action. In the case of an action to oust a corporation from its franchises, however, a very definite interest may be required. Thus in People v. North Chicago Railway Company (28) quo warranto was asked to keep the company from operating its road beyond the limits of Chicago and from using steam power within the city, on the ground that the act authorizing it to do so was unconstitutional. The relator stated that he was the owner of real estate contiguous to one of the streets upon which the company was, as he claimed, unlawfully operating its railroad, but the court said: "It is here shown that Jones is an inhabitant of the town in which the road is being oper-

(27) 56 Pa. St. 270.
(28) 88 Ill. 537.

ated, and the owner of real estate therein; but it is not shown that he is, either specially as an individual or in common with all the other citizens of the town, injured by the construction and operation of the road."

Section 4. Certiorari.

§ 27. **Nature.** The writ of certiorari has sometimes been termed a writ of review. Like prohibition, and unlike mandamus, it lies to courts of inferior jurisdiction or to persons exercising judicial or quasi-judicial functions. Unlike prohibition, however, it is not a preventive but a corrective measure. Prohibition lies to prevent further usurpation of authority, certiorari issues as a rule only after final judgments. Its purpose is to obtain the record from the inferior tribunal, and to correct at least jurisdictional errors appearing therein.

§ 28. **To review questions of jurisdiction.** Certiorari does not lie merely to determine whether the subject matter acted upon was entirely outside the jurisdiction of the inferior tribunal, as, for instance, whether a justice of the peace had attempted to try a man for murder. Thus, in State v. Moniteau County Court (29) it was required by law that a petition for a liquor license filed in a county court should contain the signatures of a majority of the assessed, resident, taxpaying citizens; and the court held that this requirement was one going to the jurisdiction of the court which might be reviewed by certiorari. It said: "The true function of this common law writ is generally to prevent inferior tribunals, where there is no appeal or writ of error, from exceeding their jurisdic-

(29) 45 Mo. App. 387.

tion; but it is not confined to cases where there is an entire want of jurisdiction; it may be resorted to where having jurisdiction, the tribunal makes an order exceeding its powers."

§ 29. **To review questions of law.** In many states the courts have gone even further in outlining the scope of certiorari and have held it to lie to review all questions of law, whether going to the jurisdiction or not, where neither appeal nor error would lie. Thus, in Farmington Water Power Company v. County Commissioners (30) where certiorari was asked to quash the proceedings of the commissioners in refusing to abate a town tax assessed upon the petitioner, the court said: "The court is bound to determine, upon an inspection of the whole record, whether the proceedings are legal or erroneous." But unless expressly authorized by statute to determine whether the decision of a point of fact was contrary to the weight of evidence, the court cannot review questions of fact. Thus, in the last case the court said: "A writ of certiorari lies only to correct errors in law and not to review the decision of a question of fact upon the evidence introduced at the hearing in the inferior court."

§ 30. **Issued only to review judicial or quasi-judicial action.** The distinction between quasi-judicial action, where a board or sometimes a single officer has to weigh evidence and pass judgment on it much as in a regular judicial proceeding; and discretionary action, on the one hand, where an official exercises his shrewdness or foresight, and ministerial action, on the other, where but

(30) 112 Mass. 206.

little discretion or judgment are required, was referred to in Public Officers, §103, elsewhere in this volume. The distinction is also important here. An instance of the exercise of certiorari over a body not strictly judicial is the case of Drainage Commissioners v. Griffin (31) where the commissioners had decided that lands outside the original district were benefited by the drainage system and so had enlarged the district to include them. The court said: "The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature and not ministerial or legislative. . . . But it is not essential that the proceedings should be strictly and technically judicial in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes called quasi-judicial. The body of officers acting need not constitute a court of justice in an ordinary sense. If they are invested by the legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character." In this case sufficient notice had not been given the owners of land in the annexed district, and on account of the resulting lack of due process of law in the proceedings the judgment quashing them was affirmed. Another class of quasi-judicial proceedings in which certiorari is frequently invoked is that of removals for cause.

§31. **Same (continued).** A case where the tribunal was held not to be acting judicially is that of In re Saline

(31) 134 Ill. 330.

County Subscription (32) where the county court had subscribed for $400,000 of the stock of a railroad company, and certiorari was asked charging a want of authority to make the subscription and issue the bonds. The court said: "All the cases are inconsistent with the idea that the exercise of a discretionary power given by law to the county court of Saline county, if it be given to make a subscription to the stock of a railroad, can be in any sense a judicial proceeding. A court has no discretion, but must render judgment according to the facts and the law, while this subscription might have been made or refused. The judges were bound, it is true, to act with good judgment, judiciously, but exercising a sound judgment is by no means synonymous with rendering judgment, and acting judiciously is not always acting judicially."

§ 32. **Inadequacy of other remedies.** It is generally stated that, if appeal may be had or a writ of error, certiorari will not lie. But this is not always true where appeal or error will not be equally effective. Thus, in State v. Guinotte (33), on being advised of the result of a will contest in the circuit court, the executrix had applied to the probate judge to be reinstated, and her request was granted and the temporary administrator ordered to turn the property over to her, notwithstanding an appeal in the will contest. The court considered that relief by appeal would be inadequate, and on certiorari quashed the order of reinstatement.

(32) 45 Mo. 52.

(33) 156 Mo. 513.

§ 33. **Discretion in granting.** As with the other extraordinary remedies there is generally a very considerable discretion in granting the writ. Thus in Newell v. Hampton (34) where a certiorari had been granted to review a case involving a mechanic's lien, a motion was made to quash the certiorari on the ground that it had been improvidently issued. The court granted the motion and said: "The allowance of a writ of certiorari is a matter of sound judicial discretion. That it is not a matter of right necessarily follows from the fact that it may be denied in some cases, as where there is otherwise an adequate remedy, or the point involved is not a matter of any serious complaint or injury. So where substantial justice has been done, though the record may show the proceedings to be defective and informal but only technical errors or inaccuracies appear."

Section 5. Habeas Corpus.

§ 34. **Origin and history.** It was declared as far back in the history of England as the Magna Charta (1215) that there should not be denied or deferred to any man either justice or right; but the first traces of the writ of habeas corpus as we have it to-day do not seem to go back of the fourteenth century. Then it seems to have been used as a means of relief from private restraint, but it came to be used against the crown in the reign of Henry VII. Nevertheless, in the reign of Charles I the court of king's bench determined that it would not lie either to bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special com-

(34) 1 Marvel (Del.) 1.

mand of the king, or by the lords of the privy council. This occasioned the petition of rights (1628), and this was followed soon afterwards by a statute allowing the writ even where the arrest had been made by the king or the privy council, and requiring a determination to be made on the legality of the commitment within three court-days after the return was made. Under Charles II, further abuses crept in so that a third writ might be necessary before the production of the party. This resulted in the famous habeas corpus act of Charles II (1679), which, however, only applied to the cases of persons committed or charged with crime, and then not to cases of treason or felony. Other cases were left to the common law. Some of the provisions of the new act were that the writ should be returned and the prisoner brought up within a limited term, according to the distance, not exceeding in any case twenty days; that persons not making due returns, or refusing to deliver a copy of the commitment papers within six hours after demand, or shifting the custody of the prisoner from one person to another should forfeit one hundred pounds to the person aggrieved for the first offense, and two hundred pounds for the second; and that no person once delivered by habeas corpus should be recommitted for the same offense on penalty of five hundred pounds (35).

§ 35. **Purpose of the writ.** In Ex parte Coupland (36), Coupland claimed that he had been illegally placed, by the provost marshal, in the custody of R. T. Allen, a colonel in the Confederate service; but Allen answered

(35) 3 Blackstone's Comm. 130, ff.

(36) 26 Tex. 387.

to the writ that before its service upon him Coupland had been drafted as a soldier into the Confederate army and that it was only in that capacity that he was detained. In the lower court Coupland had been remanded to the custody of Allen. From this he appealed, and before this appeal had been heard had deserted. It was moved that the application should be continued: first, on the ground that the court had no jurisdiction on the application if the relator were not present; and second, on the ground that if the court had jurisdiction, it would not exercise it while the relator was at large. The court said: "There is no doubt that in answer to the writ the respondent must produce the body of the person alleged to be illegally detained, if in his custody or under his control at the service of the writ, unless excused from so doing by the circumstances indicated in article 149, code criminal procedure; and that a return to the writ, unaccompanied by the body, will be scanned with great caution (37). And although this is to prevent evasions of the writ and to secure the liberty of the citizen, yet, if the party has been released from custody previous to the service of the writ, its object and purpose has been accomplished, and the court will make no order on the subject. . . . The only object of the writ is to relieve the party detained from the illegal restraint; if this is accomplished before the jurisdiction of the court attaches by the service of the writ, there is nothing upon which it can attach. It is not the object or purpose of the writ to punish the respondent, or afford the party redress for his illegal detention. But the question occupies a

(37) Hurd, Habeas Corpus, 244.

different attitude after the jurisdiction of the court has attached. It cannot then be defeated by the wrongful action of either of the parties. It is expressly provided by the code of criminal procedure, article 762, that, upon the hearing of an appeal in habeas corpus cases, the defendant (who undoubtedly must be understood to be the prisoner or party detained) need not be personally present." As it had the power, the court considered it desirable in the public interest to determine the appeal, notwithstanding the absence of the relator, and held that the purpose of habeas corpus was to determine, not whether the original caption was illegal, but whether the detention was; and that in this case his detention was due to the conscription and that, if errors had been committed in that, appeal would have to be made to the respondent's superior officers.

§ 36. **Paramount over all other writs.** In Matson v. Swanson (38) a body execution had been levied against one Bodelson, whereupon he petitioned for a writ of habeas corpus. This was granted, and pending the hearing he was released upon giving bond. Suit was brought on the bond, and it was claimed that the bond was void on the ground that no habeas corpus should have issued to release a party held under body execution, or that at least he should not have been admitted to bail, until the return of the writ. But the court held that, whether error had been committed in the particular case or not, the court issuing the habeas corpus had the power in certain cases and therefore had jurisdiction of the

(38) 131 Ill. 255.

subject matter, and the sheriff was bound to obey its mandate. The court said: "The moment the sheriff received the writ of habeas corpus, the custody of the prisoner by virtue of the writ capias ad satisfaciendum terminated and his custody by virtue of the writ of habeas corpus began, because the authority of all other writs gives way and yields to the authority of that writ."

§ 37. **Detention sufficient to warrant grant of writ.** In Ex parte Snodgrass (39) it was replied to a petition for a habeas corpus that the petitioner had been ordered committed to jail for contempt of court in not paying a fine of fifty dollars, but that he never had been committed but had been permitted to be at large on his promise to protect the sheriff. It appeared that, having a child sick at home with diphtheria, he had promised not to leave the bedside of his child, except to go to his office and back. The assistant attorney-general claimed that this was not sufficient detention to warrant the issuance of the writ, but the court said: "We deem it unnecessary to enter into a long discussion of these articles, but suffice it to say that any character or kind of restraint that precludes an absolute and perfect freedom of action on the part of the relator authorizes such relator to make application to this court for release from such restraint. It certainly cannot be insisted that, if relator is illegally arrested, he must be placed in jail and thereby be subjected to additional outrage, before he can apply to this court for the writ of habeas corpus." But it has been held in a number of cases that where a man is released on bail he will not

(39) 43 Tex. Crim. Rep. 359.

be considered as restrained so as entitle him to the writ.

§ 38. **A writ of right.** Unlike the other extraordinary writs, habeas corpus is a writ of right, and its issuance is not subject to the discretion of the judge or court issuing it. But on the other hand it is not a writ of course, that is, a writ issuable as a matter of course, as is a summons in an action for breach of contract. Thus in Thomas Sim's Case (40) Chief Justice Shaw said: "This is a petition for a writ of habeas corpus to bring the petitioner before this court, with a view to his discharge from imprisonment upon the ground stated in the petition. We were strongly urged to issue the writ without inquiry into its cause, and to hear an argument upon the petitioner's right to a discharge on the return of the writ. This we declined to do, on grounds of principle and common and well settled practice. Before a writ of habeas corpus is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there in no sufficient ground prima facie for his discharge, the court will not issue the writ. . . . It is urged that this is a writ of right and therefore grantable without inquiry. But it is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a mere ministerial act, and the party claiming it might go to the clerk and sue it out as he may a writ on a claim for land or money. It is a writ of right in a larger or more liberal sense; a right to be delivered from all unlawful imprisonment."

§ 39. **Jurisdiction of Federal courts.** Circuit courts of the United States have jurisdiction on habeas corpus

(40) 7 Cush. 285.

to discharge from custody one who is being restrained of his liberty in violation of the national Constitution, but who, at the time, is held under state process for trial on an indictment charging him with an offense against the laws of the state. That circuit courts may have this power follows from the fact that the Federal Constitution is "the supreme law of the land." But when the habeas corpus is sought because of the alleged unconstitutionality of the law under which the indictment has been had, the Federal courts have often thought it unwise to interfere before the state courts shall have opportunity themselves to declare the act unconstitutional (41). See Constitutional Law, §360, in Volume XII of this work.

§ 40. **Jurisdiction of state courts.** That state courts however, cannot "under any authority conferred by the states, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government, acting under its laws, results from the supremacy of the Constitution and laws of the United States" (42). But where a person is not held under such authority, the right of a state court to discharge by habeas corpus will not be denied merely because the proceedings involve "the determination of rights, privileges or immunities derived from the nation, or require a construction of the Constitution and laws of the United States." This was held in Robb v. Connolly (43), where one Bayley had applied for a writ of habeas corpus against Robb, who held him in custody

(41) Ex parte Royall, 117 U. S. 241.

(42) Ibid. p. 249.

(43) 111 U. S. 624.

under the warrant of the governor of California and the commission of the governor of Oregon to take and receive him as a fugitive from justice. It was urged that the warrant of arrest and delivery was not in accord with the statutes of the United States on interstate extradition, but the court said that the mere fact that this question of the laws of the United States was involved did not prevent the state court from taking jurisdiction, nor did it make Robb an officer of the United States so that one in his custody could not be released by the state courts.

§ 41. **Excess of jurisdiction in court committing prisoner.** Persons can be released on habeas corpus not only where there was an entire lack of jurisdiction over the subject matter in the committing court, but also where the latter acted in excess of jurisdiction. Thus, in Ex parte Jasper Page (44), where the prisoner on confession of guilt had been sentenced to ten years' imprisonment in the penitentiary for grand larceny, whereas the highest penalty allowed by the law for the offense was seven years' imprisonment, it was held that the court had exceeded its jurisdiction and the prisoner was ordered discharged.

§ 42. **Testing the constitutionality of laws.** Habeas corpus is frequently used to get a quick test of the constitutionality of a law. Thus, in In re Jarvis (45), where Jarvis had been tried, convicted and sentenced for violating a peddler's license act, it was urged, on his application for a habeas corpus on the ground that the act was unconstitutional, that the constitutionality of the act could not be attacked in this collateral proceeding, but

(44) 49 Mo. 291.
(45) 66 Kan. 329.

that he should have raised the point in appellate proceedings. This the court denied, but on this precise point, however, there is authority to the contrary.

§ 43. **Custody of children.** In Rust v. Vanvacter (46) the petitioner sued out a writ of habeas corpus to obtain the custody of his infant child, which had been placed in the care of the respondent, the grandmother of the infant, upon the decease of the petitioner's wife. Since then the petitioner had remarried, owned a house and was engaged as a mechanic at good wages, sufficient to enable him to support the infant. The grandmother replied that the child had been committed to her when an infant of about five months, that she was now nearly nine years old, and had come to look upon her as her mother. Quoting Hurd, the court said: "The term *imprisonment* usually imports a restraint contrary to the wishes of the prisoner and the writ of habeas corpus was designed as a remedy for him, to be invoked at his instance to set him at liberty, not to change his keeper. But in the case of infants, the illegal custody has been treated, at least for the purpose of allowing the writ to issue, as equivalent to imprisonment, and the duty of returning to such custody as equivalent to a wish to be free." The court held that "the father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court or judge, such as ill usage, grossly immoral principles or habits, want of ability, etc., is entitled to their custody, care and education," and so refused to reverse the decision of the court below giving the father the custody of the child.

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(46) 9 W. Va. 600.

§ 44. **Release on bail.** In State v. Everett, and State v. Potter (47) the defendants had been released on habeas corpus because the charges in the warrants for their commitment were uncertain. The appellate court decided that the judge granting the discharge had acted erroneously, and said: "In the exercise of this general power, which in England appertains to the court of the king's bench and here to the court of general sessions, there is no doubt that a judge before whom a prisoner is brought will look upon the commitment, if necessary, and will bail or remand, according to circumstances. And in admitting to bail, he should pay due regard to the statute regulating bail and should not admit to bail a person who is there expressly declared to be debarred from it, without some particular circumstances in his favor. He should not undertake to determine fully upon the guilt of a prisoner and set him at liberty, without bail and without day, however imperfectly the offense may have been charged in the commitment, or however strong the circumstances in his favor proved by affidavits or collected from examination. Such a power does not exist in any judge, in term time or at chambers, when any offense at all is alleged; such power would be superior to the laws, wherever lodged. It would to all purposes be a dispensing power, as effectual and dangerous as any that has been claimed or exercised under the most arbitrary governments."

§ 45. **Who entitled to the writ.** By the very nature of things the person imprisoned is entitled to the writ. Likewise it may be granted to a parent for his child, to a mas-

(47) Dudley (Ga.) 295.

ter for his apprentice, to a guardian for his ward, and to a wife for her husband; and in many cases the writ has been allowed to third persons where a proper interest has been shown, but it will not be allowed at the instance of a mere stranger.

Section 6. Injunction.

§ 46. **Special limitation of treatment here.** The general treatment of the injunction will be found under Equity Jurisdiction in Volume VI of this work. It is desired here only to distinguish it from the other extraordinary remedies and to give an idea of its use against administrative officials.

§ 47. **An equitable remedy.** The five extraordinary writs considered so far have been legal writs granted generally by the court of king's bench, where the king was supposed to sit in person, and so termed prerogative writs; but any account of administrative law in the United States, at least, would be incomplete without at least a brief reference to the great remedy of the courts of equity, the injunction. Indeed so important has become its use in affairs of public concern that the cry of "government by injunction" is a familiar one. That cry was occasioned by its frequent use in suppressing lawless acts such as mob-violence, boycotts and picketing in connection with strikes, and its use in that connection might well be considered here if it were not that its use there is analogous to its use in abating nuisances and is properly treated along with that subject. But omitting that side of its use as a remedy in the administration of government, there remains a large field where it is a public law rather than a private law remedy. For the general char-

acteristics of the writ which apply to it both in the public and the private law, the reader is referred to its treatment under Equity Jurisdiction in Volume VI of this work.

§ 48. **Distinguished from mandamus.** High contrasts the injunction with mandamus as follows: "It is only when we come to consider the objects and purpose of the two writs that the most striking points of divergence are presented. An injunction is essentially a preventive remedy, mandamus a remedial one. The former is usually employed to prevent future injury, the latter to redress past grievances. The functions of an injunction are to restrain motion and enforce inaction, those of mandamus to set in motion and compel action. In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one. The former preserves matters in statu quo, while the very object of the latter is to change the status of affairs and to substitute action for inaction. The one is, therefore, a positive or remedial process, the other a negative or preventive one" (48).

§ 49. **When granted in lieu of mandamus.** But where a mandamus is impossible, for instance, in the case where the time to act has not yet come, relief may be had by mandatory injunction closely resembling that which is generally obtained by mandamus. Thus in State v. Houser (49) a mandatory injunction was asked against the secretary of state to compel his recognition of the nominees of the one of the two rival Republican conventions of the state which had been recognized by the national party organization, and the propriety of the remedy was

(48) High, Extraordinary Legal Remedies, sec. 6.

(49) 122 Wis. 534.

recognized by the court. It said: "It must be conceded that by the general rule there is no effective legal remedy to prevent the alleged threatened wrongful act or to redress it if commission thereof were permitted. The remedy by mandamus is not available, generally speaking, in advance of some actual default in respect to a clear legal duty. . . . If special circumstances may create an exception to that rule, as suggested in the case cited, whether this case would fall within such exception is sufficiently involved in doubt to warrant a court of equity in opening its doors so far as it can afford a remedy, if the commission of a great wrong is in fact impending as alleged." The court said that if they should wait until the official were to take action, only fourteen days might elapse before the election, which would not give time for proceedings by mandamus.

§ 50. **Distinguished from prohibition.** The essential features distinguishing these two writs have already been given (§ 12, above). They are illustrated by Bluffton v. Silver (50), where a property owner had applied for a prohibition against the town and the contractor to prevent the carrying out of a contract for the laying of a sidewalk in front of his property, which he claimed to be illegal. The court said: "It may properly be observed that no case was made for the issuance of a writ of prohibition. The town council had full jurisdiction in the premises. . . . . Prohibition, if proper in the case at all, should have been obtained to prevent the making of the contract for want of jurisdiction, not the execution of it after it had

(50) 63 Ind. 262.

been made. Injunction was the proper remedy to which to resort, if there was occasion for any.'' But it seems clear that if prohibition had been asked before the making of the contract, it would have been denied on the ground that the making of the contract was not a quasi-judicial, but a discretionary matter (§ 13, above).

§ 51. **Distinguished from quo warranto.** One of the best settled rules of the law is that injunction is not to be made use of to try the title to office. Thus in Osgood v. Jones (51) the complainant was treasurer of Merrimack county, his term of office extending until June 30, 1881, and until his successor should be chosen and qualify. The election judges declared the defendant elected and issued an election certificate to him, but the complainant claimed there had been fraud in the election and asked for an injunction to prevent his assuming the office. The court, quoting from High, said: ''No principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment of public officers, or their title to office, such questions being of a purely legal nature and cognizable only by courts of law. A court of equity will not permit itself to be made the forum for determining disputed questions of title to public office, or for the trial of contested elections, but will in all such cases leave the claimant of the office to pursue the statutory remedy, if there be such, or the common law remedy by proceedings in the nature of a quo warranto.''

(51) 60 N. H. 543.

In other matters than those involving a title to office, however, the line is often very close between injunction and quo warranto. Thus the authorities are pretty evenly divided as to which is the proper remedy when a municipal corporation attempts to exercise its authority over territory not properly within the corporation limits. The question involved in such cases is whether the exercise of such power is the usurping of a franchise by the municipality, from which it is to be ousted by quo warranto; or merely an exercise of power in excess of authority, to be restrained by injunction.

§ 52. **Distinguished from certiorari.** Injunction may not be used to usurp the place of certiorari in reviewing irregularities in the action of a quasi-judicial board. Thus in Lane v. Morrill (52) an injunction was asked to restrain a joint board of selectmen and school committee from establishing a new school district, on the ground that the board had admitted irrelevant and illegal evidence at the hearing before them, and that, influenced by such illegal and improper evidence, they decided the matter differently from what they otherwise would and against the manifest interest and right of the plaintiffs. The court said that the action of the board was clearly judicial in character and that the proposition advanced came to this, "that the court shall entertain and consider, on a bill in equity, any and all exceptions that may be taken to the admission or rejection of evidence before tribunals of this sort; and, what is more, if upon such decision it should be found that the tribunal erred, the matter is not to be

(52) 51 N. H. 424.

sent back to them for correction of their error, but the whole proceedings are to be practically annulled by the summary process of injunction.'' The court rejected this proposition and said that, whether certiorari would lie or not, if any remedy existed it would have to be found in proceedings on the law side of the court.

§ 53. **Distinguished from habeas corpus.** Though, like habeas corpus, injunction is frequently made use of to test the constitutionality of laws, it is not likely to be confused with it. Habeas corpus is the great remedy for testing constitutional wrongs to the person, the injunction wrongs to property.

§ 54. **Not used to control discretion.** That injunction may be used to prevent an official from illegal action, but not to interfere with his discretion, is illustrated by the cases of American School of Magnetic Healing v. McAnnulty, and Bates v. Payne (53). In the former case, injunction was allowed against a postmaster, acting under instructions from the postmaster general, to prevent him from excluding from the mails certain tracts on mental healing on the ground that they were fraudulent. The court said that the exclusion of matter which was not fraudulent was contrary to law and enjoined it. In the second case, the plaintiff wished an injunction to compel the recognition of a certain series entitled ''Masters of Music'' as a periodical publication and entitled to be received as second-class mail matter. The court said: ''The rule upon this subject may be summarized as follows: Where the decision of questions of fact is commit-

(53) 187 U. S. 94; 194 U. S. 107.

ted by Congress to the judgment and discretion of the head of a department, his decision therein is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

§ 55. **To prevent officers acting under unconstitutional laws.** It has long been the practice to allow injunctions against tax officials and the like, acting under unconstitutional laws, where the damage would be irreparable and the other requisites of an injunction are present. In those cases the threatened injury to property is immediate and in the nature of trespass, but of late years there has been a strong tendency to extend the scope of the injunction so as to allow it in cases very far removed from trespass. Thus the courts will enjoin the action of state railroad boards in enforcing rates prescribed by the legislature, where the court considers that the enforcement of the particular rate in question will deprive the railroad of its property without due process of law.

§ 56. **Taxpayer's action to restrain unlawful expenditures of money.** One of the most frequent uses of the injunction against officers is to prevent the unlawful expenditure of money. Especially is this so in the case of counties and municipalities. Thus in Davenport v. Kleinschmidt (54), where a city council had granted an exclusive right of selling water to the city for a period of twenty years at a minimum rate, it was held that any tax-

(54) 6 Montana, 502.

payer, on behalf of himself and others, had the right to institute proceedings in a court of equity to prevent the misapplication of public funds by municipal officers, on the ground that the threatened illegal contracts would increase the burden of taxation and thus burden the plaintiffs. But it has been held that the mere fact that the plaintiff is a resident is not sufficient to entitle him to bring the action (55).

§ 57. **To restrain collection of assessment.** Injunction is frequently used to restrain the collection of assessments, where the officials have not jurisdiction over the person or the property, or threaten to act in some other way that would be depriving the plaintiff of his property without due process of law. But, where the assessment is clearly illegal, the court may consider that no such injury will result as to call for equitable interference. This was the case in Stuart v. Palmer (56). There an assessment for a local improvement had been made without notice to, or a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed; and the court held that, if carried out, the effect would be to deprive the owner of his property without due process of law, but it also held that, as the invalidity of the assessment would always appear, it would constitute no such cloud on title as would call for the interference of a court of equity.

§ 58. **Exercise of police powers not generally interfered with.** Courts of equity are loath to interfere with the enforcement of police regulations, even where they are more or less arbitrary and cause substantial injury. Thus,

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(55) Caruthers v. Harnett, 67 Tex. 127.

(56) 74 N. Y. 183.

an injunction was refused by which it was sought to restrain the police authorities of New York city from placing policemen in front of a public house in which guests had been repeatedly subjected to unjust, exorbitant and illegal charges, and from giving warning to strangers about to enter to be careful (57). But instances have not been lacking in recent years where such interference has occurred. Ordinarily the proper remedy where police supervision is exercised in an arbitrary and unlawful manner is an action for damages or a criminal prosecution.

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(57) Prendorill v. Kennedy, 34 How. Pr. 416.

CONFLICT OF LAWS

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INTRODUCTION.

§ 1. **Origin of subject.** In its origin, the field of law designated by the term Conflict of Laws or Private International Law, is part of the English common law, and thus is in force in jurisdictions which, like our American states, derive their unwritten law from that system.

§ 2. **Function of its rules: Questions of jurisdiction of law.** As may be inferred from the name given to this topic of law, it concerns itself with the conflicting rules of different states and nations. These may come into conflict in furnishing the law to be applied to a case, or in providing the court which is to apply the law.

The conflict may arise in supplying the law. Of this an instance occurs when the individual whose rights are to be determined has been placed in such a physical position that it may plausibly be contended that each of two sovereignties should provide the law applicable to the case in hand. The laws of these sovereignties may differ; under the laws of one he may have rights, and, under the other, none. Another instance occurs when he goes into the territory of another sovereignty and there contends, in ascertaining his rights, that he has carried with him the laws of the state from whence he came. The various positions in which the individual may be placed, where it may be plausibly contended that the laws of more than one sovereignty should apply to him, will be taken up fully in the body of this topic. Even though the rule ultimately applied is that of a single sovereignty, a plausible contention may be made that the law of some other state should be applied. Some rule to solve the problem is required. The principles of Conflict of Laws are concerned, in part, with furnishing rules to determine which of two or more conflicting bodies of law should be drawn upon to ascertain the rights of parties.

§ 3. **Same: Questions of jurisdiction of courts.** The law of this subject is not confined, however, to furnishing rules to decide which of two or more antagonistic juris-

dictions should provide the proper law for the determination of rights; but it also provides rules to determine which of two or more judicial tribunals shall decide given controversies of law or fact. This conflict may arise in a variety of ways. An individual may have come but temporarily into the territory where the court sits, and he may contend that the court, by reason of his mere temporary presence, has no power to pass upon the controversy between him and the moving party (the plaintiff). He may, on the other hand, never have been in the territory, but may have property there, which the court has taken to satisfy the claim of the moving party. Here, again, he may contend that only the court where he resides has the power to enter such a judgment as would validly permit the moving party to apply the property to the satisfaction of his claim. The conflict may be presented in other ways to be more fully discussed. Conflict of Laws deals with the solution of such problems, as well as those indicated in the preceding subsection.

CHAPTER I.

JURISDICTION TO PROVIDE LAW.

Section 1. Migration.

§ 4. **In general.** Among civilized people it is scarcely conceivable that any territory should be entirely without some law. Yet, it may perhaps be said with safety that an undiscovered, uninhabited territory has no laws. Every territory inhabited by civilized people, however, has laws for the determination of rights between men. To modern thought, every man residing or being in any territory ought to be subject to some law, by virtue of which he may determine his personal and property rights as against his neighbor. He should be assured that some rule is provided by the territory in which he resides or happens to be, by which any attack upon his person or property may be redressed or prevented, and, furthermore, that, if such an attack is made, there is at his service a body of applicable law, furnished either by the unwritten customs of the community, or by some legislative action, by which he can determine and enforce his rights against the attacking party. On the other hand, if he is accused of having committed a wrong against another individual of that territory, or against the inhabitants of the entire territory, he ought likewise to have such a body of law to which he may resort to determine whether he has committed such a wrong, and not be left

to be dealt with arbitrarily, without any rule of conduct.

§ 5. **Settlement of uninhabited country by migration.** If an uninhabited country can be said to have no law, such a condition cannot exist after civilized people settle it. They require laws by which to fix their rights and determine their controversies. But where shall this law come from? The territory had none before it was settled, and the settlers have never met in a body or in a representative assembly to adopt a code of laws. Under such conditions, the rule is that these settlers are governed by the laws of the territory from which they migrated. They have always lived under them and are acquainted with them, and, perhaps, with them only, and naturally reach back to them and make them the rule to guide their actions. An English court has said: "Where Englishmen establish themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own state" (1).

In McKennon v. Winn (2) the court said: "When people from all parts of the United States . . . settled the country known as Oklahoma, built cities, towns and villages, and began to carry on trade and commerce in all its various branches, they brought into Oklahoma with them the established principles and rules of the common law, as recognized and promulgated by the American courts." This rule is generally followed.

It must be noted, in this connection, that no question of Conflict of Laws arises when rights are to be determined under the laws of the newly-settled territory. It is a mere

(1) Advocate General v. Dossee, 2 Moore P. C. (N. S.) 22.

(2) 1 Oklahoma, 327.

matter of ascertaining whether the new inhabitants have any laws at all, before they have enacted any, and it is seen that they have. Neither do they enforce the law of the territory from which they migrated, as the law of that territory, but as the law of their own territory. No question of a conflict between the laws of one sovereignty and those of another is presented in a case where the rights of the settlers are being determined.

§ 6. **Settlement of inhabited country by migration.** In the preceding subsection an instance was given of how a body of law may migrate to another country, so to speak, with the individuals who have lived under it, and become the law of that country. Still another illustration of the movement of law occurs where a migration of a number of people with fixed laws and customs takes place into another territory, inhabited by people also having fixed laws for their regulation. A very conspicuous instance of such a movement occurred when settlers from the eastern part of the United States moved into what is generally termed the Mexican cession, or that territory which Mexico ceded to the United States. From the Mexican cession several states were made, and among them Utah. These states were all settled by persons coming from other states and territories. At the time of settlement they were inhabited by people who adhered to the laws and customs of Mexico. Mexico, in turn, derived its laws mainly from the civil law or the laws of Rome. According to the civil law it was not necessary that a contract for the purchase or sale of land be evidenced by an instrument in writing. According to the common law, when it is recognized that the English statute of frauds

is a part thereof, such a contract, to be binding upon the parties, must be written. If two persons in Utah made a verbal contract for the purchase and sale of land, in the early days of the settlements there, some doubt must have been thrown upon the validity and enforceability of such a contract.

§ 7. **Same: When newcomers are predominant.** If the courts, in passing upon this conflict between the bodies of law that might have supplied Utah with a rule to govern such a case, had followed the ordinary rule, they should have held the contract enforceable, as the law of the early inhabitants of Utah and not the law of the settlers should control. An English court has said, with reference to a settlement made in India: "The first settlement made in India . . . was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country. . . . If the settlement had been made in a Christian country of Europe the settlers would have become subject to the laws of the country in which they settled" (3).

A different result was, however, at times reached by the courts of that region, which adopted the view that the law the settlers had formerly lived under had become a part of the country they had settled. Such a result is justifiable where the settlers come in such numbers that they are the predominant element in a community. When their numbers become great and their ideas and institutions influential and powerful, a tendency to lose sight of the laws of the early inhabitants results. Where that has

(3) Advocate General v. Dossee, 2 Moore P. C. (N. S.), 22.

occurred the courts have not hesitated to hold that the settlers were not bound by those alien laws of a foreign country, but by those they brought with them (4). But the occasion for a conflict of the laws by which rights are to be determined is presented, and must be passed upon by the courts, guided by some known rule of law.

SECTION 2. TEMPORARY ACCESSION OF TERRITORY. SHIPS.

§ 8. **In general.** A fertile field for the application of the rules of Conflict of Laws is afforded where there has been an accession of territory governed by laws of its own to another nation having also its own laws. A simple form of such accession, though only temporary, occurs when a ship flying the flag of one nation comes within a marine league (three miles) of another nation, or where it anchors in a harbor of another.

As preliminary to the consideration of this form of accession, let us determine by what law a ship is governed, when sailing on the high seas. A unique feature of the dual character of the law governing vessels sailing from American states will also be mentioned, as it illustrates the opportunities that exist for a conflict of laws.

§ 9. **Ships on the high seas.** For many purposes, a ship is deemed in law a floating island (5), as it were, a detached portion of the mainland, of the nation from which it hails and whose flag it flies. In Seagrove v. Parks (6) it was sought to bring a proceeding in foreign attachment against one who was a naval officer on the royal ship "Cockatrice," sailing on the high seas at the

(4) First National Bank v. Kinner, 1 Utah, 100.

(5) Forbes v. Cochrane, 2 B. & C. 448.

(6) [1891] 1 Q. B. 551.

time. In order to be entitled to bring such a proceeding, it was necessary for the complaining party to show that the defendant was outside the territorial boundaries of England. It appeared that the defendant was on a ship on the high seas, and it was decided that a substituted service, proper only where the defendant was outside the territorial jurisdiction of England, could not be permitted, the court saying: "As long as the defendant is on board his ship, he is within the jurisdiction." If a vessel is thus still a part of the territory whose flag it flies, the law of that territory should naturally control the rights of the persons on board, as between themselves.

§ 10. **Same: Illustrations.** Another instance in which a court acted upon this rule is to be found in McDonald v. Mallory (7). In that case a vessel was registered in a port of the state of New York, and was owned by citizens of that state. While on the high seas, beyond the physical boundaries of any state or nation, the owners by their negligence caused the death of another. By a New York statute damages could be recovered from those who caused death by negligence. This is a statutory right, and does not exist at common law. It was contended that the New York law could not be in force on the vessel at the time the injury was committed. The court said: "It is clear that, in order to maintain this action, it is necessary to establish that the statute law in question was operative on board of the vessel upon which the injury was committed. . . . The locus in quo was not within the actual territorial limits of any state or nation, nor

(7) 77 New York, 546.

was it subject to the laws of any government, unless the rule which exists from necessity is applied, that every vessel on the high seas is constructively a part of the territory of the nation to which she belongs, and its laws are operative on board of her." It held that the law of New York was applicable, thus illustrating the rule that a vessel on the high seas, entirely beyond the territorial boundaries of the nation to which she belongs, is constructively a part of the territory of that nation, and that that nation furnishes the law for the vessel.

Although the case of Norman v. Norman (8) was not expressly decided on such a principle, it is consistent with it. That was an action to declare void a marriage solemnized on board a vessel from California, because the marriage ceremony had not been performed according to the requirements of the law of California. The court held that the parties had not entered into the marriage relation, as they had not followed the California statute in performing the ceremony. The case is explainable on the basis that the vessel was a floating part of California, and that the statutory method of solemnizing a marriage prescribed by California was applicable to all persons on board the vessel.

§ 11. Same: Foreigners on board. This law applies not only to citizens and inhabitants of the nation from which the ship sailed, but to foreigners as well; it controls not only the civil rights of the parties on board, but it also makes criminal acts, done on board, offenses against the criminal laws of the ship's nation. In Regina

(8) 121 California, 620.

v. Sattler (9), the court said that any persons on board an English ship on the high seas, not within the territory of any foreign nation, whether such persons be foreign or English, are as much amenable to English law as if they were on English soil. It was held that a foreigner who had killed another on board an English ship was guilty of murder.

These cases, where the vessel at the time the right arises is not within the territorial jurisdiction of some other nation, but on the high seas, do not present a conflict between the law of the nation to which the vessel belongs and some other law. A single law, only, can with any plausibility be made applicable. It points, however, to the possibility of such a conflict, when the vessel, carrying with it the law of its nation, sails into the harbor or port of another nation, and thus makes it conceivable that the nation where the ship physically is may have some voice in determining by what laws it shall be governed.

§ 12. **Same: From American states.** The rule stated in the preceding subsection is of general application. Owing to the dual character of the law-giving power in the states of the Union, a unique and peculiar condition results as to what law controls a vessel that sails from one of the states. As to certain fields of law the states have retained their power to legislate and to provide the law to be applied; as to others they have delegated the law-making power to the national government. The fact that such a division has been made has a bearing upon

(9) 1 D. & B. 525.

the law to which is subject a vessel on the high seas flying the flag of a state. The division is made between laws regulating civil rights merely and those regulating crimes on the high seas. As the latter have been placed under the exclusive legislative power of the Federal government, the criminal codes of the states have no application on board their vessels after they leave their boundaries. On the other hand, the same vessel looks to the laws of its state to provide the rule to determine the civil rights of the parties on board (10).

§ 13. **Same: Illustration.** A conflict of laws has resulted in a few cases, as a result of the failure to perceive the composite character of the law regulating a vessel sailing from a state of the Union. In Crapo v. Kelly (11) a vessel sailed from the state of Massachusetts, and, while on the high seas, an insolvency proceeding was brought against the owner in Massachusetts. By virtue of this proceeding it was claimed title had passed under the laws of Massachusetts to the owner's assignee in insolvency. After these insolvency proceedings had been taken, the vessel came within the boundaries of the state of New York, and an attachment was levied on her there to satisfy a claim against the former owner. If, at the time the vessel was on the high seas, the laws of Massachusetts controlled, the subsequent attachment on the ground that the vessel was still owned by the insolvent was void, as a new owner had stepped in. If, however, as was contended, the law of the Federal government alone was operative when she had gone upon the high seas, then

(10) McDonald v. Mallory, 77 New York, 546.
(11) 16 Wall. (U. S.), 610.

the insolvency proceedings under Massachusetts law had no effect. The court held the Massachusetts law was applicable to control this civil matter, and that as to such matters the Federal laws did not apply. The vessel was controlled by the state law in civil matters, and by the Federal law in criminal. The title of the assignee, acquired by operation of the Massachusetts law, was sustained, to the exclusion of any Federal law.

§ 14. **Ships within foreign territory.** Ships sailing on the high seas do not present cases of accession of the territory of one nation to another. When such floating territory has arrived within three miles of such nation, or entered a port or harbor, it can then, for the first time, be said that the territory of a foreign nation has been added to its territory. Under such conditions, by whose laws shall the newly, though temporarily, added territory be governed? What nation shall supply the laws to regulate the rights of those on board—the law of the nation from which the vessel came, or the law of the nation where it has arrived or anchored? If the movement were simply a movement of a railway train from one state into another, the law of the state where the passengers and train were, as a physical fact, would control. This would be stated as the rule without much hesitation.

§ 15. **Same: Criminal acts on ships.** In the case of sea-going ships the answer cannot be so readily given. In Regina v. Lesley (12), certain subjects of Chili in South America were banished by the government from Chili to England. The defendant, the master of an Eng-

(12) 8 Cox C. C. 269.

lish merchant vessel lying in the waters of Chili, contracted with the government of Chili to take the banished persons to England. They were placed upon the vessel and taken by the master to Liverpool. The banished persons brought a criminal action against the master for having falsely imprisoned them on the English ship. Two points are raised in the case: First, could the master be made criminally liable for what he did within three miles of the shore of the government of Chili? As to this the court answered he could not be. The court said: "Although an English ship in some respects carries with her the laws of her country, in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof." The court here recognized that, as to acts done to the banished men while the ship was in Chilian waters, the English law had no power to punish, another law being effective. The second point determined by the court was that, as to the act of continuing to keep the banished men imprisoned after the ship had left the Chilian waters, the master was guilty of a false imprisonment and sentenced him. The latter point is merely an application of the principle before stated, that, on the high seas, the nation whose flag the ship flies furnishes the law to which those on board owe obedience.

§ 16. **Same: (continued).** In Wildenhus's Case (13) a subject of Belgium, whose name was Wildenhus, was one of a crew of a Belgian steamship, Nordland, lying moored at the dock of the port of Jersey City, New Jer-

(13) 120 U. S., 1

sey. An affray occurred between Wildenhus and another while on board, and Wildenhus stabbed the other with a knife and wounded him so that he died. The police authorities arrested Wildenhus, and placed him in a common jail to await his trial. While thus imprisoned he brought a habeas corpus proceeding to get his freedom. He did this on the theory, that, he being on the Belgian ship when the deed was done, he had not broken the laws of New Jersey, but the laws of Belgium, if any. For violating the laws of the latter country he ought not be punishable in New Jersey. The conflict was created by the physical presence of the Belgian vessel, with its Belgian laws, in the territorial bounds of New Jersey. The court held the New Jersey law applied, explaining it thus: "By comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country (where the vessel was stopping), or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged." From this case the rule is deducible that, generally, private vessels from another nation are governed by the laws of that nation, except as to acts which are of such grievous character that they disturb the public tranquillity. Those are governed by the law of the locality of the ship.

§ 17. **Same: Public vessels.** In the case of Forbes v. Cochrane (14) a British squadron was stationed at the

(14) 2 B. & C. 448.

mouth of St. Mary's river in Florida. At that time (1815) Florida was still a Spanish province and slavery was permitted there. Several of plaintiff's slaves escaped from him, took refuge on the ship "Terror Bomb," and Sir George Cochrane, the rear admiral, refused to make them return or to give the owner any assistance. Slavery was at that time prohibited in England. The owner brought suit in England against Cochrane, the admiral, for the injury sustained in the loss of his slaves. The defense made for the admiral consisted in an application of a principle of conflict of laws. The contention was made that the "Terror Bomb" was a part of British territory and was free soil, that as soon as the slaves came on board they were free men, and that the Spanish law of the neighboring territory where slavery prevailed had no force on board the ship. The court so held, saying, "The moment they got on board the English ship there was an end of any right the plaintiff had, by the Spanish law, acquired over them as slaves." In this case the vessel involved was a public vessel, a war vessel owned by the British government. The act of permitting the slaves to remain on board the vessel was not a crime and nothing occurred to disturb the tranquillity of the inhabitants of Florida as in the Wildenhus case. The rule is, however, in a case where the vessel involved is a war vessel, that only the nation to which the vessel belongs has the right to punish for such a crime, and it alone furnishes the law to be applied and determines whether under that law a crime has been committed.

§ 18. **Only one law applicable to a single matter.** In some cases, courts have taken the indefensible position

that the law, either of the vessel, or of the mainland near which it is, may be applied, and that those on board are amenable to both. In Regina v. Anderson (15) a merchant vessel sailing under the British flag had entered the Garonne River in France, bound for Bordeaux. It had proceeded about half way up the river to Bordeaux, which was ninety miles from the Atlantic, and at the time the offense charged was committed was about three hundred yards from the nearest shore, the river being about half a mile wide at that place. The vessel belonged to the port of Yarmouth, in Nova Scotia, but was registered in London and was flying the British flag. The defendant was an American citizen. The crime charged was murder, and this belonged to the class which disturbed public tranquillity of the French nation and made the French law applicable. The English court held that the defendant was subject to British law, and convicted him of manslaughter. It said: "Although the prisoner was subject to American jurisprudence as an American citizen, and to the law of France as having committed an offense within the territory of France, yet he must also be considered as subject to the jurisdiction of British law, which extends to the protection of British vessels, though in ports belonging to another country. . . . The only effect of the ship being within the ambit of French territory is that there might have been concurrent jurisdiction had the French claimed it."

§ 19. **Same: Criticism of contrary view.** The court concedes in its opinion that, when an act disturbs the

(15) 11 Cox C. C., 198.

tranquillity of France, French law should control. With this concession the court should have held that the French law, and it alone, should be applied, and that no nation had been offended by the commission of the deed except the French nation. It was its privilege to punish and no other nation should have done so. As stated by the court in Swift v. Philadelphia and Reading Railroad Co. (16): "There cannot be separate systems of law over the same subject matter, and the same territory, emanating from separate sources of authority." Unless such a rule is adopted and followed, an individual may find himself in duty bound to do an act by the law of one nation, which by the law of another he is prohibited from doing. Under such a concurrent law-providing rule as the Anderson case supports, the individual would be guilty at all events, under one nation or the other, whether he acted or failed to act. The composite character of the law applied to vessels sailing from the American states presents this concurrent element. In those cases, however, the laws of the state regulate the civil topic and the Federal laws do not interfere. On the other hand, the Federal laws regulate the criminal topic, and the state criminal laws have no application. In this way, the concurrent legislation for the vessel is harmonized, and no inconsistency can result, as in the case instanced where the laws of two nations apply to the same topic—the topic of crimes (the Anderson case).

§ 20. **Summary.** This section has dealt with the temporary accession to one nation of the floating territory of

(16) 64 Federal, 59.

another. The accession is for a brief period of time only; furthermore, it is made to many nations with diverse laws. This twofold reason explains the existence of the rule that the law of the nation from which the vessel sails should control the rights of those on board and determine their correlative duties. The cases examined in this section illustrate that the law of the vessel's nation follows her and prevails over the law of the territory near which she may be. It provides the rule of conduct in civil and criminal matters when the vessel is a war vessel, a ship owned by the government. On the other hand, when the vessel is owned by private individuals, such as merchant vessels commonly are, then the law of the vessel's nation is again applied except in the case of crimes which disturb the public peace and tranquillity. The law of the nation where the vessel is defines these, and only that law should be capable of being violated.

SECTION 3. PERMANENT ACCESSION OF TERRITORY.

§ 21. **In general.** In the consideration of the permanent accession of territory and the conflicts that may result therefrom, different forms of such accession deserve attention. There is a form of accession in which no laws are brought with the territory, as is usual in cases of accession. Another form of accession is found where the territory added brings with it a complete set of laws. Allied to this form is the addition to the United States made upon the admission of a new state into the Union.

§ 22. **Accession of strip adjoining national shores.** Among nations there is a tacit understanding that, if any nation desires to add to its jurisdiction and to subject to its laws and government a strip of the high seas one ma-

rine league in width, which borders on its boundaries, it may do so. If such addition is made, the strip is taken without laws, and no conflict can result between the laws of the newly added strip and the mainland. In Regina v. Keyn (17) the defendant was charged with the crime of manslaughter. He was in charge of a foreign vessel, which was sailing on the high seas within a marine league of the English coast. Through his negligence he ran the vessel against another vessel, broke a hole into her, and she sank. The deceased, whose death defendant is accused of having caused, was on board the latter ship and was drowned. It seems to have been conceded that, if the English law was applicable on the high seas, then defendant was guilty. The court held the English law was not extended to the high seas. The majority of the court took the position that such an extension of the laws could only be made by an express enactment of Parliament. The minority took the view that a custom of applying English law to that strip of sea was sufficient. The defendant, not having violated the English law against manslaughter, as it did not exist where the deed was done, was found not guilty.

§ 23. **Same (continued).** The question has arisen, what laws are applicable to the inland bays, formed by the high seas, which are less than two marine leagues from headland to headland. In Commonwealth v. Manchester (18), defendant, a citizen of Rhode Island, was charged with seining for fish in the waters of Buzzard's Bay in Massachusetts. The bay was more than one, but

(17) 13 Cox C. C. 403.

(18) 152 Massachusetts, 230.

less than two, marine leagues from headland to headland, but at the point where the offense was committed the distance to the shore of the bay was more than a league. It was contended that, as the place where the act was committed was more than a marine league from the shore, defendant was not guilty, and that he was amenable only to the law of Rhode Island, the state of his ship. The court held, however, that he was amenable to the laws of Massachusetts. This was so held by the court, by virtue of a rule of law that states have jurisdiction, as a common law right, of all inland arms of the sea; that is, those bays that are less than two marine leagues from headland to headland. The contest in this case was similar to that in Regina v. Keyn, above, and the ultimate question was whether the laws of Massachusetts extended over the bay. The court held they did.

§ 24. **Accession by discovery.** Accession tc a nation may occur by the discovery of new lands, as in the case of America. When such land is uninhabited, or peopled by savage tribes having no recognized laws, the newly discovered territory becomes an addition to the territory of the discovering nation, and immediately is made subject to its laws. As agreed in Blankard v. Galdy (19), "in case of an uninhabited country newly-found out by English subjects, all laws in force in England are in force there." When an accession occurs in this way, no conflict of laws can arise, as but a single law is applicable.

§ 25. **Accession of territory having fixed laws: Conquest.** A nation which adds to its domain the territory

(19) 2 Salkeld, 411.

of another having a fixed code of laws has the power to legislate for the added territory. In the absence, however, of legislation expressly made applicable to such territory, the former laws of the new acquisition will control.

In Blankard v. Galdy (20) defendant was sued on a bond. To avoid liability on this bond he pleaded that it was given for the purchase of the office of provost-marshal in the island of Jamaica, which he pleaded was a possession of the crown of England. He also pleaded that by an English statute a bond given for the purchase of a public office was void. The plaintiff replied that Jamaica was a territory which England had acquired from Spain by conquest; that the English statute did not apply; that only the laws of Jamaica could be referred to to ascertain the validity of the bond; and that by the law of Jamaica it was valid, as a bond could there be given for the purchase of a public office. The court held the laws of Jamaica applied, saying: "Jamaica being conquered, and not pleaded to be parcel of the kingdom of England . . . . the laws of England did not take place there, until declared so by the conqueror or his successors." This case presented a conflict as to whether the laws of the conqueror or of the conquered should control the rights and duties of the inhabitants of the conquered territory, and it was held that the laws of the added territory should control, unless and until changed by the conqueror.

§ 26. **Same: Peaceful cession.** In Chicago and Pacific Railway Co. v. McGlenn (21) an action was brought against the railroad for the value of a cow that had

(20) 2 Salkeld, 411.

(21) 114 United States, 542.

strayed upon the right of way and been killed by the company within the limits of Fort Leavenworth military reservation in the state of Kansas, where the road was not enclosed with a fence. The action was founded upon a statute of Kansas which made every railroad liable for the cattle it killed, but provided it should not apply to those railroads that enclosed their right of way with a good and lawful fence. This statute had been in force on the tract of land where the injury occurred. Subsequently thereto, and while that statute was still applicable, the Kansas legislature passed an act, ceding jurisdiction over the reservation to the United States. The chief contention made by the railroad was that, after the cession, the act relating to the liability of railroads for killing and wounding cattle and the duty to fence was not in force. The court held, however, that it was still in force, saying:

"The contention of the railroad company is that the act of Kansas became inoperative within the reservation, upon the cession to the United States of exclusive jurisdiction over it. We are clear that this contention cannot be maintained. It is a general rule of public law, recognized and acted upon by the United States, that whenever political jurisdiction and legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws which are intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign. By the cession, public property passes from one government to the other, but private property remains as before, and with it those municipal laws which are designed to procure its peaceful use and

enjoyment. As a matter of course, all laws, ordinances and regulations in conflict with the political character, institutions and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of a country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect, and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general, that a change in government leaves them in force until, by direct action of the new government, they are altered or repealed. . . . The law of the state, making the railroad liable for killing or wounding cattle by its cars and engines where it had no fence to keep such cattle off the road, was as necessary to the safety of cattle after the cession as before, and was no more abrogated by the mere fact of cession than regulations as to the crossing of highways by the railroad cars, and the ringing of bells as a warning to others of their approach. . . . The laws of Kansas on the subject, in our opinion, remained in force after the cession, it being in no respect inconsistent with any law of the United States, and never having been changed or abrogated."

§ 27. **Law of interstate commerce before congressional action.** The Federal Constitution has been construed to vest in Congress the exclusive power to regulate interstate transportation rates (22). That body did not for many years pass a general code for the regulation of that commerce, and it became a serious question for the courts and the public, whether there was any law under which the transaction between an interstate carrier and a party shipping products between states, where no contract had been made, could be regulated, and the rights and duties of the shipper and carrier fixed. The question became of serious importance when interstate carriers gave discriminating rates to shippers, and when the shippers who paid excessive rates brought actions against the carriers to recover the difference between what other shippers paid, who received the low rate, and the amount paid by the complaining shippers. The lower courts differed as to whether there was any regulative law applicable, and it was not until the Supreme Court of the United States applied the rules of Conflict of Laws that the question was finally settled.

§ 28. **Same: View that no law forbids discrimination.** The first opinion to call particular attention to the subject was given by Judge Grosscup sitting as United States circuit judge for the northern district of Illinois in the case of Swift v. Philadelphia and Reading Railroad Co. (23). In that case he expressed the view that there was no law, in the absence of express legislation by Congress, under which a recovery could be had for an exac-

(22) Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557.

(23) 58 Fed. 858.

tion by a carrier from a shipper of an unreasonable interstate rate, and that the entire matter of rates was without regulation until Congress passed a statute with reference to it. He held that the United States, as a sovereignty, had no distinct common law separate from the common law of the states, and refused to recognize the applicability of the common law of the states to the subject of interstate rates, because the power of furnishing the law applicable thereto had been by the Constitution absolutely surrendered to Congress.

§ 29. **Same (continued).** Neither did he accede to the proposition, as he pointed out in a subsequent case (24), involving the same question, that the United States succeeded to the law of any state which regulated rates and gave relief against unjust exactions made by carriers. In the latter case he said: "The supreme power of the state is, with us, divided. The line of division is not territorial, but topical. Each inch of soil is subject to the rule of two powers of state, overlapping each other in some respects, but never conflicting, and divided always according to prearranged constitutional adjustments. In some fields the nation is the sole power to prescribe rules of conduct, in other fields that power is exclusively in the state, and in still other fields it is concurrent. It is plain that in the first of these fields the emanation of a rule of conduct from the state as, in the second, a like emanation from the nation, would not have the effect of law. Neither, in the field of the other, is a power in the state. The nation has not the power to prescribe rules of civil conduct

(24) Swift v. Philadelphia, etc., Ry. Co., 64 Fed. 59.

within the field exclusively belonging to the state. The state has not the power to prescribe rules within the fields exclusively belonging to the nation. From each of these two fields, the nation and the state, as the case may be, is excluded as a lawgiver. Now, this must apply as well to the system of law to which the sovereign succeeds as to that which it immediately creates; to the common or civil law, as well as to that which comes from its own legislative or judicial will. In other words, the state or nation, having no power to give law in the fields exclusively belonging to the other, logically, can have succeeded to no law applicable to such fields. Neither can have a common law or a civil law within fields to which it can extend no law at all."

§ 30. **Same: View that a Federal common law is applicable.** The same question arose before Judge Shiras sitting as circuit judge of the United States for the northern district of Iowa in a case (25) where the carrier had given concessions and rebates to the plaintiff's competitors, in the business of buying and shipping grain to Chicago, of fifteen dollars a car. The action was brought to recover from the carrier the damages caused to the shipper by being compelled to pay the excessive and unreasonable rate. Judge Shiras held that the carrier was liable. He repudiated the view of Judge Grosscup that there was no law regulating rates applicable to interstate commerce shipments, in the absence of a statute passed by Congress. His opinion was that there was a national common law which should be applied to all the topics for

(25) Murray v. Chicago, etc., Ry. Co., 62 Fed. 24.

which Congress had the exclusive power by the Constitution to legislate.

§ 31. **Same: View that state common law continues until changed by Congress.** The Supreme Court of the United States, in the case of Western Union Telegraph Co. v. Call Publishing Co. (26), passed upon the same question. The Call Publishing Company was publishing the Lincoln Daily Call, a newspaper in Lincoln, Nebraska. Its competitor was the Nebraska State Journal. The defendant, the Western Union Telegraph Company, furnished daily dispatches from the Associated Press to both of these publishers, but it furnished such dispatches to the competitor at a considerably less charge than to the plaintiff. The suit was brought to recover the excess from the telegraph company. That court, Judge Brewer delivering the opinion, took a view that placed a liability upon the telegraph company for exacting unreasonable rates. His conclusion is reached, however, by a method of reasoning entirely consistent with the principles of Conflict of Laws, and repudiating the theories of the lower courts. The underlying principle upon which that decision is based is the principle governing cases where there has been an accession of new territory. The United States government, in the fields over which it is given the exclusive power to legislate, stands in the same relation towards the states that make up the Union as the conquering nation does to the nation it has conquered, as pointed out above (27). It stands in the same relation

(26) 181 U. S., 92.

(27) See § 25.

towards the states that it does towards territory (28) it has acquired for purposes of erecting forts and other military purposes, and the rule of Conflict of Laws applicable to territory acquired in that way is applicable to the states of the Union.

§ 31a. **Same: Reasoning in support of latter view.** Every state when admitted to the Union had some law by which the rates carriers could charge were regulated, and by which a recovery could be had against a carrier that charged unreasonable rates. It was this law to which the court resorted in making the Western Union Telegraph Company liable. The court said: "There is no body of Federal common law, separate and distinct from the common law existing in the several states, in the sense that there is a body of statute law enacted by Congress, separate and distinct from the body of statute law enacted by the several states. But it is an entirely different thing to hold that there is no common law in force generally throughout the United States, and that the countless multitude of interstate commercial transactions are subject to no rules, and burdened by no restrictions, other than those expressed in the statutes of Congress. . . . Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress? We are clearly of the opinion that this cannot be so, and that the principles of the common law are a feature upon all

(28) See § 26.

interstate commercial transactions except so far as they are modified by congressional enactment."

The laws of the state regulating commerce, when the state is admitted to the Union, continue to regulate it even after its admission, and when, by such admission, it has surrendered the exclusive power to legislate upon that topic to the Federal Congress. The power to alter the existing law was given to Congress; but, until so altered, the law applicable to interstate commerce before the state became a member of the Union remains unchanged and applicable, although the future regulation of that commerce was transferred to the United States.

§ 32. **Independent judgment of Federal courts as to state commercial law.** The dual system under which the states are placed makes it possible for the state and Federal courts, sitting therein, to arrive at irreconcilable views of what the law of the state is upon certain questions, even where the Federal courts profess to administer the law of the state. The Federal courts follow the decisions of the state courts very generally, upon all matters of law except those involving rules of commercial jurisprudence. In such controversies they have adopted a unique rule, by which they hold that they will apply their own views of the commercial law.

The leading case (29) upon this subject arose in the Federal court for the state of New York. By the law of that state, the plaintiff was not a bona fide indorsee, for a valuable consideration, of a bill of exchange, the value he had given for it to the indorser being the mere surrender

(29) Swift v. Tyson, 16 Peters (U. S.), 1.

of a pre-existing claim he had against him. The court held that "a pre-existing debt does constitute a valuable consideration in the sense of the general rule already stated, as applicable to negotiable instruments."

§ 33. **Same: Argument for this view.** It was contended in that case that it was the duty of the Federal courts, by virtue of a Federal statute (30), to follow the decisions of the state court. The court answered this contention thus: "In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts, or other written instruments, and especially to questions of general commercial law, where the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we

(30) Ch. 20, Section 34, Judiciary Act, passed in 1789.

have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." See the article on Constitutional Law, §§ 364-67, in Volume XII of this work.

§ 34. **Possible differences of judicial opinion regarding state common law of interstate commerce.** The courts, in passing upon a question pertaining to interstate commerce, such as the question of reasonable rates, are bound to the principle that the subject is not without law; and, further, that the law to be applied is the law that prevailed in the state in question at the time the state was added to the Union. What that law was may not always be uniformly decided by both the state and Federal courts. It is, however, the law of the state that is applied.

As said by the court in Smith v. Alabama (31): "There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England as adopted by the several states, each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes. . . . A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This

(31) 124 U. S., 465.

arises from the circumstance that courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit, or by which the transaction is governed, exercise an independent, though concurrent, jurisdiction, and are required to ascertain and declare the law according to their own judgment. This is illustrated by the case of Railroad Co. v. Lockwood (31a), where the common law prevailing in the state of New York, in reference to the liability of common carriers for negligence, received a different interpretation from that placed upon it by the judicial tribunals of the state; but the law as applied is none the less the law of that state."

§ 35. **State criminal law upon Federal subjects also continues until changed by Congress.** At common law it was a special crime to libel the king. The settlers of the colonies brought with them the common law of England. By that law it was a crime to publish a libel about the sovereign. In conformity with this rule of law, it was a crime at the time the states became a Union, in case they had in no way changed the common law, to publish a libel about a governor or ruler of a colony or state. By the formation of the Union, the colonies, and by the subsequent admission into the Union, the territories, surrendered to the national government the function of ruling their territory, with respect to interstate commerce, war, and other topics defined in the Constitution, and to another sovereign known as the President. It would seem to follow, logically, that if a person, in a state that recog-

(31a) 17 Wall. 357.

nized it to be a crime to libel an executive, should libel the President, he would be as guilty of the crime defined by the state law as if Congress had expressly legislated upon the subject, but it would be a crime against the state.

§ 36. **Same (continued).** The offense would be one under a law by which the state was governed, before it became a part of the Union by a form of accession, and a law which the national government had not changed, but which is still a law when its distinctive subjects of jurisdiction are in any way affected. That it must be the law that existed before the territory was made a part of the Union, without any later statutory modification made by the state legislature must follow of necessity; for, after the cession of the territory, the state has no power to legislate as to topics ceded exclusively to the central government. As a consequence of the necessity that such law should have existed before the territory forming the state became a part of the Union, it follows also that if no such law making it criminal to libel a governor or other official existed at that time, the offense could not be committed against the President. And thus in some parts of the United States it would be a state crime to libel the national executive, while in others it would not, a result perfectly consistent with the nature of the relation between the state and central governments as to topics upon which Congress has taken no action. In no place, however, would it be a Federal crime, because until Congress acts, the law violated is only the pre-existing state law (31b). See Criminal Law, § 3, in Volume III of this work.

(31b) United States v. Hudson, 7 Cranch, 32.

§ 37. **Concurrent legislation of two nations for same territory: In general.** Out of the commercial intercourse which citizens of the United States and of other Christian nations have with Mohammedans and other Eastern peoples, whose laws and customs differ radically from those of Christian nations, arises a necessity for a modification of the laws of the non-Christian nations. These modifications are usually accomplished by treaty. When modified, offenses against the sovereignty of such a nation, committed by a citizen from a Christian nation, are tried in courts established in such nation and punished by methods provided by the Christian nation. The power of the United States to provide for such a trial and a punishment of its citizens, when at variance with the provisions of the Constitution, was called in question in Re Ross (32).

§ 38. **Same: Illustration.** An American ship was lying in the harbor of the Japanese city of Yokohama. Ross committed murder on board that ship. He was tried by the American consular tribunal in Japan and sentenced to death. The trial was conducted before a consul from the United States, and Ross was by him convicted and sentenced to death without taking the verdict of a jury. This method of trial was agreed upon between the Japanese and United States governments, by treaty, to avoid subjecting citizens of the United States to the methods of trial and punishments of the Japanese, which were repugnant to those approved in the United States. The President of the United States commuted this sentence and

(32) 140 U. S. 453.

made it life imprisonment in the penitentiary at Albany, New York. Ross applied for a writ of habeas corpus, and contended that the legislation authorizing treaties of such a character to be carried out was unconstitutional, in that the method of accusation was not by indictment of a grand jury and the trial was without a jury, both of which are expressly provided for in the United States Constitution. The court held that the laws did not violate the Constitution as they were applicable to a territory to which the Constitution did not extend its protection. The offense Ross had committed was an offense against the Japanese government, as the crime was of a character that disturbed its public tranquillity and it was committed on an American vessel lying in one of its harbors. But the method of trial and punishment of the crime, inasmuch as it was committed by a citizen of the United States, was different for him than for one of Japan's own citizens. Yet, the citizens of Japan were not thereby affected, but only citizens from the United States; thus the Japanese territory had two forms of legislation to punish the same crime, one which was originally Japanese and the other American, but only one was applicable to a single class of persons under its jurisdiction.

§ 39. **Same: Conflict as to applicable law.** The Ross case is an instance where the Japanese law was modified by an express agreement between it and the United States. As a result two methods of trial and punishment were provided for by its laws, one applicable to Japanese citizens and one to citizens from the United States. In that case, however, no conflict arose as to which of the two

distinct territorial laws defining the method of trial and punishment was applicable to Ross.

In an English case (33), the modification which the government of India permitted to be made in its laws to accommodate English citizens who settled there resulted in presenting a conflict in India. The English had settled in India for purposes of commerce and trade in what are known as factories. These factories, owing to the indulgence or weakness of the Hindoo potentates, were permitted to retain the laws of England for Englishmen, and they were treated for many purposes as a part of the territory of the English sovereign. The English law, at the time of those settlements, provided for a forfeiture to the crown of all the personal property of one who committed suicide. Rajah, a Mohammedan and subject of India, resided within the territorial limits of one of these factories, and, while thus a resident, took his own life. By the Hindoo code, this act derived its moral character altogether from the circumstances in which it was committed; sometimes it was blameable, sometimes it was justifiable, and sometimes it was meritorious, or even an act of positive duty. Under no circumstances was it punished by a forfeiture of the property of the person who had done the act. The advocate-general, on behalf of the English crown, made a claim to all the Rajah's personal property, on the theory that the English law of forfeiture applied to him, as he had lived within the factory where the English law controlled. The attempt was made to apply to a subject of India the law which was applicable only to Eng-

(33) Advocate General v. Dossee, 2 Moore P. C. (N. S.), 22.

lishmen, and which, as shown in the Ross case, could at any rate be successfully applied to them.

§ 40. **Same: Rational solution of difficulty.** The court held, however, that the English law applied only to subjects of Great Britain, who resided in the factories, and that the law of India was the law by which Indian subjects within the same district were governed.

The inconvenience and injustice resulting from the principle advocated in a case heretofore discussed (34), where it was suggested by the court that two nations could provide the law for the same individual in a given territory and on a given topic, is forcibly presented by this case and rationally solved. If both the law of England and the law of India had been applicable to the Rajah, and he had been placed in circumstances where it was deemed by the Hindoo code as a positive duty to take his own life, then a failure to do so, on the one hand, would have been an offense to that code; on the other hand, his obedience to it would have resulted in an offense to the English law. The solution of the English court for such a dilemma is given in the Rajah case, by holding that, though two sets of laws are applicable to a given territory, they are not both applicable to the same class of individuals, but one to one class and another to another. The conflict thus disappears, and it becomes a mere matter of determining to which class this individual belongs.

§ 41. **Summary.** In the section preceding this (§§ 8-20), it was pointed out that a vessel carried with it the laws of the nation whose flag it carried. In case of its

(34) See §§ 18, 19, above.

temporary accession to the territory of another nation with different laws, as a rule the laws of the ship controlled as against the laws of the neighboring land. The only exception to the rule was found where an act was committed on board which disturbed the public tranquillity of the mainland, and in such a case its law was effective. In this section the matter of permanent accession has been treated. It is found that where a territory, having a fixed body of laws, is added to another having its own laws and customs, either by purchase, or otherwise, the law of the new territory remains effective to regulate the rights and duties of its residents, in the absence of legislation by the dominant nation made applicable to the accession. The principle thus deduced from cases involving a strictly international union of territory is applicable to the relations that exist between the central government of the United States and territory it has acquired from the states upon which to place its forts and military equipment. It is also applicable to the much more important relation between the states themselves and the Federal government. It provides a solution for important questions in fields of legislation which the states have delegated to the central government but in which Congress has not acted. The answer it gives to the question, whether the law of the state as it existed upon its admission to the Union shall be applied, or not, is, that the pre-existing law shall control.

CHAPTER II.

DOMICILE.

§ 42. **In general.** The preceding chapter dealt chiefly with the applicability to an individual, in one territory, of the law of another nation in whose territory he was not actually present and in which the transaction, to which some rule of conduct had to be applied, did not occur.

We shall next consider the possibility of applying the law of a nation, from whose territory the individual has parted, but with which he has not finally severed all relations. The relations retained may be manifested in different forms, such as having preserved a domicile there, or having property, real or personal, under its protection, or both.

§ 43. **Problems connected with domicile.** The maintenance of these relations with one nation, when the individual is at the same time in another nation, has given rise to a multitude of problems, such as: Whether the validity or construction of contracts and instruments of conveyance is to be determined by the law of the domicile, by the law of the nation where the property is, or by the law of the place where the contract or instrument of conveyance was executed; whether the marital rights of one spouse, in the property of the other, are to be determined by the law of the matrimonial domicile, the law of the domicile of the married pair when the controversy arose,

or the law of the nation where the property in which marital rights are claimed is located; whether the nation of a person's domicile shall provide the rules for the distribution of his property in case of his death intestate, or the nation where he is, or the nation where his property is; whether the validity and construction of his will is to be determined by the law of his domicile, by the law of the nation where his will was made, by the law of the nation where the property is located, or by the law of the nation where he dies. To all of these Conflict of Laws gives an answer. In the investigation and solution of the problem, which of two or more nations is capable, as a matter of international law, of providing the court or tribunal to grant divorces, the domicile is of the greatest importance. See Chapter VI, Section 3, below.

As appears from the problems just stated, the domicile of an individual is an important element in the determination of a number of them. Owing to its great importance, a separate chapter will be devoted to the rules of law applied in determining where one's domicile really is, and when he has succeeded in acquiring a new one.

§ 44. **Term "domicile" explained.** Courts and law writers have at various times sought to give a definition of the word "domicile." Vattel defines it as "the habitation fixed in any place, with an intention of always staying there." Some courts have modified this by saying that it is the habitation fixed in any place without any present intention of removing therefrom; others have said it is the habitation of an individual at a place accompanied with the intention to remain there permanently, or at least for an indefinite time. The definition most fre-

quently referred to is that of Justice Story in his work on Conflict of Laws. He says that one's domicile is "his true, fixed, permanent home, and principal establishment, to which, whenever he is absent, he means to return." In giving a description of the circumstances which create or constitute a domicile, Lord Westbury, in Udny v. Udny (1), said: "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time."

§ 45. **Status of domicile is common to all persons.** The conception, recognized by the law, that every person maintains a domiciliary status in some nation, is fundamental. As stated by Lord Westbury in Bell v. Kennedy: "Domicile is an idea of law. It is the relation which the law creates between an individual and a particular locality or country. To every adult person the law ascribes a domicile" (2). As personal property, the subject of ownership, is deemed at all times to be in the possession of some one, so a person is at all times deemed to have the relation of domicile toward some nation.

§ 46. **Domicile of birth or origin.** This conception of the universality of domicile is carried even to infants. Before the age of discretion and the capacity to choose arrives, the individual is deemed by law to have the domicile of the father (3), if he is living; the domicile of the mother, his natural guardian, if he is dead. In Udny v.

(1) L. R. 1 House of Lords (Scotch), 441.
(2) L. R. 1 House of Lords (Scotch), 307.
(3) Lamar v. Micou, 112 U. S. 452.

Udny (4) the court said: "It is a settled principle that no man shall be without a domicile, and to secure this result the law attributes to every individual, as soon as he is born, the domicile of his father, if the child be legitimate; and the domicile of the mother, if illegitimate. This has been called the domicile of origin, and is involuntary." The domicile of birth persists until a new domicile is acquired. Lord Cairns said in Bell v. Kennedy, above: "The law is, beyond all doubt, clear with regard to the domicile of birth, that the personal status indicated by that term clings and adheres to the subject of it, until an actual change is made by which the personal status of another domicile is acquired."

§ 47. **Domicile of choice.** The domicile of birth or origin is ascribed to one who is incapable of making a choice. It arises by operation of law and exists entirely independently of voluntary action. This domicile is capable of being abandoned, and, when once lost, according to American law, it can only be reacquired in the usual way of acquiring a domicile. The manner in which a domicile of origin may be lost is by the acquisition of another domicile. The domicile thus acquired, and all subsequent ones, including the domicile a married woman acquires upon her marriage (when the law attributes to her the domicile of the husband), are known as domiciles of choice. It is known as such because it results from the voluntary action of the individual. "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief

(4) L. R. 1 House of Lords (Scotch), 441.

residence in a particular place, with an intention of continuing to reside there for an unlimited time'' (5). How an individual may acquire a domicile of choice, what acts and circumstances constitute evidence of the existence of a new domicile, and what do not, are discussed below.

§ 48. **Abandonment of domicile.** In the states of the Union, a domicile of origin is lost by the acquisition of a domicile of choice. The rule is the same in England. But by English law a peculiarity is recognized. When a domicile of choice is once abandoned, the domicile of birth or origin reattaches. In Udny v. Udny (6) the court said: ''The moment the foreign domicile (that is, the domicile of choice) is abandoned, the native domicile or domicile of origin is reacquired.'' It permits an abandonment of a domicile of choice without an actual intention to acquire another domicile. In the states, an abandonment of a domicile is insufficient to cause it to be lost and for another to attach. It can only be abandoned by the acquisition of another domicile. This can only be acquired by appropriate acts and an actual intent to acquire it, and is not capable of acquisition merely by virtue of an abandonment of a prior domicile.

§ 49. **Domicile cannot be acquired by agent.** There are some acts recognized by law that an individual cannot do by an agent or servant. His immediate and personal attention to the execution of the act is requisite to make it effective. Thus, one cannot exercise the elective franchise, the right to vote, by an agent. One cannot execute his will by an agent. Neither can a legislator,

(5) Udny v. Udny, L. R. 1 House of Lords (Scotch), 441.

(6) L. R. 1 House of Lords (Scotch), 441.

whom the people have made their agent to attend sessions of their law-making body, vote upon any measure by an agent. He is required to be present in person. It would seem that the same rule should apply to the acquisition of a domicile and some courts have so held (7). The cases wherein such questions have arisen were cases where the husband, after abandoning a domicile and having determined to acquire a new one, did not proceed to the new domicile himself, but sent his wife to the place, who resided there and kept the family there. The fact that he did not go there personally was held to be sufficient to prevent the domicile from attaching. Merely having an intention to acquire a domicile is insufficient; the act of removing to the place of domicile must accompany the intention (8).

Some courts, on the other hand, have held that a domicile can be acquired by deciding upon a place of domicile and sending the wife to it, without going there personally (9).

§ 50. Presence in foreign nation without intent to establish domicile. In Bell v. Kennedy (10) it became material to determine whether Mr. Bell's domicile was in Jamaica, his domicile of origin, or whether he had acquired a new domicile of choice in Scotland. His parents moved from Jamaica to Scotland. His father died when he was about ten years old. He was sent to school in Scotland, and after he had passed through col-

(7) Hart v. Horn, 4 Kan., 232.

(8) Talmadge v. Talmadge, 66 Alabama, 199.

(9) Bangs v. Brewster, 111 Massachusetts, 382.

(10) L. R. 1 House of Lords (Scotch), 307.

lege, he traveled on the continent. He then returned to Jamaica and cultivated his father's estate, which, through his father's death, had become his property. A change was made in the laws of Jamaica which met with his disfavor, and he determined to abandon Jamaica as a place of domicile. He sought an estate in Scotland for several years but did not acquire one, and there was no evidence tending to show that he had finally settled in Scotland, although he was there during all these years. He talked of buying an estate in England and making that his domicile. Under the circumstances the court held Scotland was not his domicile, although he was actually present there for some time. He did not continue this presence with an actual intent to make Scotland his home. He seems to have divided his intention between England and Scotland. As long as his intent to be domiciled in one of the two had not appeared, he could not be deemed to be domiciled in either, but must be deemed to have retained his domicile of origin in Jamaica.

§ 51. **Domicile while on the way to new abode.** A party who resided and was domiciled at Boston concluded that he would leave Boston, never to return. He determined to make Waterford, Connecticut, his next domicile. Instead of going directly to Connecticut, he took a trip of four years in Europe, finally settling in Waterford. The question arose, whether he was domiciled during the four years in Massachusetts or in Connecticut. The court held (11) that during the period while he was on the way to his new domicile—the four

(11) Borland v. Boston, 132 Massachusetts, 89.

years after the abandonment of his Massachusetts domicile—he still retained that domicile. The case shows that a change of domicile cannot be effected while one is on his way to a new domicile, even though he have an intent to make the place in view a domicile. The presence in the new domicile must concur with the intent.

§ 52. **Change of domicile not accomplished by mere absence.** A change of domicile cannot be perfected by mere absence from a prior domicile. If a domicile is abandoned for purposes of regaining health, it will not be lost. In one case a woman went to Europe for her health. She had been domiciled in New York, and intended to return there after she had regained her health. While in Europe her physician informed her she could not return to her domicile in New York, but must remain in Europe. The court held that the mere fact that she had concluded that she could not return to New York did not operate to give her a domicile where she was compelled to remain. It was essential that she should determine upon some new domicile, before she would lose the old one. This she had not done and thus she had not lost her domicile (12). Similarly, domicile is not changed by a mere absence from it for pleasure or travel (13). The same rule would hold of an absence for purposes of business (14) or to hold public office (15).

§ 53. **Compulsory absence from domicile.** If a man is domiciled in one state and is taken to another under

(12) Dupuy v.Wurtz, 53 N. Y., 556.
(13) Culbertson v. County, 52 Ind., 361.
(14) Easterly v. Goodwin, 35 Connecticut, 279.
(15) Hannon v. Grizzard, 89 N. C., 115.

arrest, he cannot be said to have changed his domicile to the state to which he was taken, merely by virtue of the change of physical presence (16). And one confined in a prison does not become domiciled therein (17). Paupers in a poor-house do not acquire a domicile there, but retain their former domicile (18). This is the rule unless an actual intent to acquire a domicile there is shown. Furthermore, political refugees, who are away from their native domicile by reason of the higher authority of the state, do not ordinarily relinquish their domicile (19). As stated by Lord Westbury in Udny v. Udny (20): "There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness" in order to effect a change of domicile.

§ 54. **Domicile of corporations.** In the United States, a corporation, like a natural person, can have only one domicile. This is the state in which it was organized and incorporated (21). This rule is, however, not followed in England. The view there is that a corporation may have many domiciles. Lord Leonards said, in an opinion where the point was involved (22): "I think that this company may properly be deemed to have two domiciles. Its business is necessarily carried on by agents, and I do not know why its domicile should be

(16) Young v. Pollak, 85 Alabama, 439.
(17) Barton v. Barton, 74 Georgia, 761.
(18) Clark v. Robinson, 88 Illinois, 498.
(19) Ennis v. Smith, 14 How. (U. S.), 400.
(20) L. R. 1 House of Lords (Scotch), 441.
(21) Bergner Co. v. Dreyfus, 172 Massachusetts, 154.
(22) Carron Iron Co. v. Maclaren, 5 H. L. C., 416, 449.

considered to be confined to the place where the goods are manufactured. The business transacted in England is very extensive. The places of business may, for the purpose of jurisdiction, properly be deemed the domiciles.''

CHAPTER III.

CONTRACTS AND CONVEYANCES.

Section 1. Personal Contracts.

§ 55. **In general.** The contracts a person may make divide themselves conveniently, for the purposes of this discussion, into two classes; those that involve merely personal rights and duties, and those that involve property. In the first class may be grouped contracts for rendering services or paying money, including notes, marriage contracts, and the like. They do not directly involve any particular property. In the second class may be placed all contracts pertaining to property, including all instruments of transfer commonly used to convey title to property between living persons, such as contracts of sale of personal property or real estate, deeds, mortgages and the like. This classification excludes the instrument of transfer by which title is passed upon death of the party who executed it. That instrument, the will, will be discussed in connection with testate succession, Chapter V, Section 2, below.

§ 56. **Validity of business contract determined by law of place where made. Capacity of maker.** In Milliken v. Pratt (1) Mrs. Pratt agreed to guarantee the payment of any sums of money Milliken should advance to her

(1) 125 Massachusetts, 374.

husband. The Pratts were domiciled in Massachusetts. The contract, however, was made and to be performed in Maine. By the law of Maine a married woman was no longer subject to the usual common law disabilities, and a contract made by her in that state was valid. On the other hand, in Massachusetts, the state of Mrs. Pratt's domicile, married women were subject to the common law disabilities. It was contended by Mrs. Pratt that the law of Massachusetts should control, and that she should not be made liable on her contract of guaranty. The court held that the law of the place where the contract was made should control as to its validity and also as to the capacity of Mrs. Pratt to make a contract. Mrs. Pratt was held liable on her guaranty. The same rule has been applied to promissory notes. In Thompson v. Taylor (2) a married woman issued a promissory note in New York, but she was domiciled in New Jersey. By the law of the latter state she was incapable, being a married woman, of making a valid note. By the law of New York no such incapacity existed. The court held her liable on the note, because its validity and her capacity to issue it were determined by the law of the state where it was issued, and not by the law of her domicile.

It has been contended that the validity of a contract of suretyship should be determined by the law of the place of payment. In a case where the contract was made in Illinois, where a married woman could enter into such an obligation, and payable in Indiana, where the contract would have been void, the court said: "All

(2) 66 N. J. L., 253.

matters bearing upon the execution, the interpretation, and validity of the note, including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made. All matters connected with the payment, including presentation, notice, demand, protest, and damage for non-payment, are to be regulated by the law of the place where the note is to be paid. . . . If a contract is valid by the law of the place where it was executed, it is valid everywhere." The court determined that the place of payment did not determine the validity of the note (3).

§ 57. **Same (continued).** In the preceding subsection, the law of the state where the contract was made permitted a married woman to make contracts, and the law of the domicile did not. When the converse appears, the rule is the same. That is, where by the law of the domicile a married woman can make a contract, but by the law of the place where it was executed she cannot, the law of the place of execution controls. In Nichols v. Marshall (4) a married woman was domiciled in Iowa. By the law of Iowa, a married woman could enter into a valid suretyship obligation for her husband. In Indiana she could not. The defendant, a married woman, made a contract of suretyship in Indiana on behalf of her husband, and suit was brought upon it. The court decided for the defendant, saying: "It is more just, as well as more convenient, to have regard to the laws of the place of contract, as a uniform rule operating on all contracts and which the contracting parties may be pre-

(3) Garrigue v. Keller, 164 Ind., 676.

(4) 108 Iowa, 518.

sumed to have in contemplation when making their contracts, than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all. Indeed, it is a rule of almost universal application, that the law of the state where the contract is made and where it is to be performed enters into, and becomes a part of, that contract, to the same extent and with the same effect as if written into the contract at length."

§ 58. **Validity of marriage determined by law of place where solemnized.** In one case (5), an English gentleman, who had not reached the age at which he could enter into a valid contract of marriage by the law of his English domicile, was temporarily in Scotland with a regiment of soldiers from England. While there he became engaged to and married Miss Gordon, the plaintiff. She asked for a restitution of conjugal rights against him. He sought to avoid the marriage on the ground of his incapacity to make the marriage contract. By the law of Scotland he was of sufficient age to enter into the contract.

The court would not annul the marriage, but decreed that "Miss Gordon is the legal wife of John William Dalrymple, Esq., and that he, in obedience to the law, is bound to receive her home in that character, and to treat her with conjugal affection, and to certify to this court that he has so done."

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(5) Dalrymple v. Dalrymple, 2 Haggard Consistory, 54.

§ 59. **Same (continued).** The rule stated above was followed in later decisions of the English courts. In Simonin v. Mallac (6), Leon Mallac, a Frenchman, married a Frenchwoman. The marriage was solemnized in England and according to its laws the marriage was valid. But, by the laws of France, and by a prior French decision on the same case, the marriage was a nullity, as the parties had not complied with the requirements of the Code Napoleon, the French statute which regulated marriage contracts. The court held that the validity of the marriage contract should be determined by the laws of the place where made, and that the law of the domicile of the contracting parties was immaterial. These two cases were recently followed in England (7).

§ 60. **Same: Exception.** Two other important decisions rendered by the English court, which have had a great influence in the United States, seem to have departed from the rules announced in the cases thus far referred to. These cases are Brook v. Brook (8) and Sottomayor v. De Barros (9). In the former case William Lee Brook's first wife died, and he then married her sister, Miss Emily Armitage. Both parties were domiciled in England, but went to Denmark on a temporary visit and while there were married. The laws of England prohibited marriages between a widower and his first wife's sister, but, by the laws of Denmark, there was no prohibition against a marriage between such persons.

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(6) 29 Law Journal, Probate, 97.

(7) Ogden v. Ogden, 97 Law Times Report, 827.

(8) 9 House of Lords Cases, 193.

(9) 3 Probate Division, 1.

The court decided that there was an exception to the rule that a marriage good by the law of the place where solemnized was good everywhere. That exception was a case where by the law of the domicile of the parties to the contract such a marriage was considered against good morals and public policy. The court held that the Brook case came within the exception and held the marriage void.

§ 61. **Same: Further exception.** In the Brook case, the state where the parties were domiciled and in which they resided passed upon the case and held the exception applicable under such circumstances. It would seem that, as long as the marriage did not violate the public policy of the nation where the court passing upon the question was sitting, the decision would be in harmony with the general rule in the Dalrymple and Simonin cases. But, in the De Barros case, the public policy rule was abandoned and it was held that the law of the domicile should control the validity of the marriage, even when a court of a nation whose public policy the marriage did not offend was passing upon the question. In that case persons domiciled in Portugal were married in England. They were first cousins and by the law of their domicile first cousins could not intermarry, but England had no law against persons thus related intermarrying. The court recognized this fully when it said: "If the parties had been subjects of Her Majesty domiciled in England, the marriage would undoubtedly have been valid." The court held the marriage void, saying: "If the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp

a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons, both, at the time of their marriage, subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized."

§ 62. **Same: Importance of exceptions in America.** The rule of these two cases is of importance in the states of the Union because some of them have statutes prohibiting a marriage of the offending person where a divorce has been procured. A person subject to the restriction of the statute will contract marriage in a state which has no such restrictive statute and return to his domicile. The question of the validity of such a marriage is then squarely presented.

§ 63. **Same: American decisions.** The decisions have not been uniform in the United States on this subject. In Commonwealth v. Lane (10) a criminal action was brought against Lane for polygamy. He had been divorced from his first wife, who had procured a decree because of his wrong and fault. He went to New Hampshire and remarried. By the law of his domicile, Massachusetts, it was polygamy and criminal for a person against whom a divorce had been procured to marry again at any time during life. But by the law of New Hampshire there was no such restriction. The court took the view that a marriage good where solemnized is

(10) 113 Massachusetts, 458.

good everywhere, and found Lane not guilty of any crime. But in Kinney v. Commonwealth (11) a court took a contrary view. By the law of Virginia colored persons and whites were prohibited from intermarrying. Kinney married a colored woman in the District of Columbia, where no law against such an intermarriage existed. In a criminal prosecution against Kinney, the court held the marriage between these persons void, taking the view of the Brook case that the marriage, being against the public policy of the state of the domicile, was void, even though no limitation or restriction was placed upon such a marriage by the law of the place of solemnization.

SECTION 2. CONTRACTS AND INSTRUMENTS OF TRANSFER.

§ 64. Validity of contract to transfer personal property: Between parties to transfer. If, by the law of the state of the transferor's domicile, a contract to sell a chattel must be in writing, but, by the law of the place where the contract is made, no writing is required, it would seem sufficient, as between the contracting parties, for the contract to be oral. Even though not in writing, if good by the law of the place where made, it should be good everywhere. The difference between a contract with reference to a chattel, and an ordinary contract fixing the relations between parties, such as a marriage contract or a contract for labor, is not sufficient to warrant a different rule.

§ 65. Same: Illustration. In Emery v. Clough (12) a case arose where Emery made a gift of a bond to an-

(11) 30 Grattan (Virginia), 858.

(12) 63 New Hampshire, 552.

other. This gift was made in contemplation of death. By the law of Emery's domicile in New Hampshire such a gift was valid, only if proved by the testimony of two indifferent witnesses, upon petition by the donee to establish the gift, within sixty days after the death of the donor. But, by the law of Vermont, where the gift was made, it was valid without a petition. It was contended that the transfer was in the nature of a contract, and, to be effective to pass title, must be made in accordance with the law of the domicile. The court held it valid though made according to the law of the place of the gift, saying: "If it is a contract, in this case it was executed in Vermont, in the life of plaintiff's intestate. If it is not a contract, as that term is commonly understood, it is a gift which received the assent of both parties, and nothing remained to perfect the conditional title of the defendant before the decease of the donor. The transfer of the bond being therefore either an executed contract or a perfected gift in Vermont, and valid under the laws of Vermont, is valid here." Thus it appears that a transfer of a chattel, whether by contract or as a gift, even though the contract is not executed nor the gift made in accordance with the law of the domicile, is nevertheless good as between the parties to the contract or gift.

§ 66. **Same: Against subsequent interest of third parties. Law of situs.** The rule where third parties become interested, after the contract or transfer is made, will next be considered. In Langworthy v. Little (13) a party owned a horse and buggy in New York. He was

(13) 12 Cushing (Mass.), 109.

domiciled in Massachusetts, but went to New York, where his chattels were, and executed a mortgage on them, and this mortgage was recorded. The transfer was perfect, according to the law where the chattels were situated. The owner then took the property to Massachusetts, where it was attached by a third person to satisfy a debt. The attaching party had no knowledge of the mortgage transfer. The mortgagee sued for the value of the horse and buggy and recovered, the court saying: "A party who obtains a good title to property, absolute or qualified, by the laws of a sister state, is entitled to maintain and enforce those rights in this state." In a very similar case a vendor of a chattel contracted to sell it, but the title was to remain in him until paid for. This was a valid contract of transfer by the law of Massachusetts where it was made. The vendee took the chattel to New Hampshire, where a creditor attached it without knowing of the vendor's interest in it. The vendor replevied the property and recovered. A transfer or contract to transfer, if valid by the law of the place where the chattel is at the time, is valid everywhere even as against third persons.

This law of the place where the property actually is at the time is called the "law of the situs" [Lat., place].

§ 67. **Same: Further illustration.** In Green v. Van Buskirk (14) a slightly different set of facts makes it possible to announce the principle of the preceding cases in more imperative terms. It is not only true that, if the transfer is made in accordance with the law of the place where the chattel is situated, it is valid against third per-

(14) 5 Wallace (U. S.), 307; 7 Wallace, 139.

sons everywhere, but a transfer to be good against such persons must be made in accordance with such law. In that case Bates owned certain safes which were situated in Illinois. Van Buskirk took a mortgage on them in New York, but did not record it as required by the law of Illinois. Green, a creditor of Bates, attached the property and sold it to satisfy his claim. Van Buskirk sued him for the value of the chattels. The court held he could not recover. The case carries the principle of the preceding cases a step further, and shows that a transfer of a chattel, situated in another state than that in which the contract of transfer is made, to be valid against third persons must be made in accordance with the law of the place where the chattel is situated.

§ 68. Same: Choses in action. In an English case (15) an Australian corporation had a claim for subscriptions to its stock against a person domiciled in Scotland. It made a transfer of its claim to another. Such a transfer in Australia was good, even as against attaching creditors, without the necessity of the assignee giving notice to the debtor that the assignment had been made. But, by the law of Scotland, where the property may be said to have been located by analogy to the chattel cases, a notice to the debtor was requisite in order to prevent attaching creditors taking the claim ahead of the assignee. An attaching creditor garnished the claim due the corporation in the Scotch debtor's hands. The court held that the attaching creditor's rights were superior to those of the assignee.

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(15) In re Queensland Co. [1891], 1 Ch. Div. 536.

§ 69. **Same: Shares of corporate stock.** In the case of Masury v. Arkansas National Bank (16) the registered holder of stock in an Arkansas corporation made a transfer of it to another, but no change was made on the books of the company to show the transfer. The transferor still appeared to be the owner. By the law of Illinois the rights of the tranferee are superior to those of an attaching creditor, even though the transfer has not been made on the books, but, by the law of Arkansas, the attaching creditor's rights are superior to those of the transferee. The court held that the law of Arkansas, where the property was deemed to be located, would control. An Arkansas attaching creditor succeeded as against the Illinois transferee of the stock.

§ 70. **Validity of contract concerning real estate: Ordinarily determined by law of situs.** In Swank v. Hufnagle (17) a married woman owned land situated in Indiana. She executed a mortgage on it in the state of Ohio, where she was domiciled, to secure her husband's debt. By the law of Indiana, where the land was, a married woman could not make a valid mortgage to secure another's debt. This protection was afforded by the law of that state to married women, against the loss of their property by becoming another's surety. But, by the law of Ohio, which was the place of the domicile and also the place of the execution of the mortgage, a married woman could make such a mortgage on land situated there. The court held that, although the mortgage might have been valid if the land had been situated in Ohio, it was invalid

(16) 87 Fed., 381.

(17) 111 Indiana, 453.

as to the Indiana land. A similar case arose where, by the law of the state where the mortgage was made and where the individual was domiciled, the mortgage would have been void because the person had not reached the age of majority, twenty-one years in that state. By the law of the state of Ohio, where the land was situated, the age of majority was eighteen. The individual who made the mortgage was over eighteen but under twenty-one. The court held the law of the place of the situation of the land controlled, and held the mortgage valid (18). The same rule would seem to be applicable to a contract to sell land.

§ 71. **Same: Note secured by mortgage.** In Frierson v. Williams (19) a married woman, residing and domiciled in Louisiana, had a separate estate in realty situated in Mississippi. She made a contract in Louisiana with reference to her Mississippi land, whereby she intended to charge it with the payment of a note, upon which the suit was brought to foreclose the lien or charge on the land. By the law of Louisiana the married woman's note was void, and it was contended that, it being void, it could not be used as a basis for a proceeding to foreclose a lien. It is the law, as shown above, that, if a suit had been brought on this note independently of the land, it would have been held to be void. By the law of Louisiana, where it was made, it would have been void; and so everywhere, even though by the law of the domicile she could have made a valid

(18) Sell v. Miller, 11 Ohio State, 331.

(19) 57 Mississippi, 451.

contract (20). The court held, however, that, as it was intended to create a charge on the land by the note, and as by the law of the state where the land was situated it could create a valid charge, it could be enforced as a lien against the land. The court said: "If she had made a contract expressly disposing of this property, it will not be denied that, though void by the laws of Louisiana, either for her want of capacity to act, or the want of the observance of the forms and solemnities prescribed by those laws, yet, if valid by the law of this state, it would have been good. The contract here is not strictly of that character, yet the making of it is the exercise of the power of the wife to dispose of her estate; for, whenever that power is denied, the power to charge it with her debts is denied also, and the charge can only be made effectual by the actual or threatened alienation of the estate, under a decree of the chancery court. The charging of her separate estate for the payment of money does not pass any actual interest in the land, but it is the first and essential step for a judicial disposition of the estate to satisfy the charge."

§ 72. **Deeds and conveyances must conform to law of situs.** In Clark v. Graham (21) a grantor of land executed a letter of attorney to another, in order to authorize him to act as his agent and make the conveyance. The land was situated in Ohio, but the power of attorney was executed in Virginia. By the Ohio laws, deeds and powers of attorney to convey land were required to be subscribed

(20) See § 57, above.

(21) 6 Wheaton (U. S.), 577.

by two witnesses and to be acknowledged before a court or a justice of the peace. The power of attorney was regular, except that the acknowledgment was taken before a notary public instead of a court or a justice. The deed had only one subscribing witness, whereas the Ohio law required two. Although no statement appears that these instruments of conveyance were executed in accordance with the law of Virginia where they were drawn, they were not executed in accordance with the Ohio law. As a result, the court held no title passed by virtue of them. The law of the state where the land is situated governs as to the form of instrument required to make a valid conveyance of it. And, conversely, it is held that a deed, good according to the law of the place where the land is situated, is a good deed, though it is not good by the law of the place where it was made (22).

(22) Post v. First National Bank, 138 Illinois, 559.

CHAPTER IV.

MARITAL PROPERTY RIGHTS.

§ 73. **In general.** In the preceding chapter rights of persons based upon express contracts were involved. In this chapter rights in property entirely independent of any express contract will be considered. The law recognizes certain property rights that arise out of the formation of the relation of husband and wife, and certain other rights that arise from its continuance under a change of domicile. These will be now considered.

§ 74. **Matrimonial domicile.** In order to comprehend the rights of husband and wife in each other's property during life, and by what laws they are determined, the domicile of the married pair must be known. If the husband before the marriage was domiciled in Massachusetts, and the wife in Connecticut, and, after their marriage, they took up their domicile at either the domicile of the husband or wife, then that domicile is known as their matrimonial domicile. They may, however, choose a place for a domicile in which neither had been domiciled before the marriage. That place is nevertheless their matrimonial domicile. It is the nation in which they first take up a domicile after their marriage. After such a matrimonial domicile has been acquired, it may be lost, as a domicile of origin or of choice may be, by the acquisition of a new domicile. In fact, several domiciles may be had during the life of a married pair. Their rights in

each other's property under such changes deserve attention, as the laws of as many nations may be involved as domiciles are acquired. The rights in each other's property, upon the death of one, may be more appropriately treated under intestate and testate succession, Chapter V, below.

§ 75. **Rights of spouses in each other's personal property: Property owned at time of marriage.** The leading American case on this subject is Harral v. Harral (1). Frederick F. Harral was born in Connecticut. He acquired an education as a physician and surgeon, and took up a domicile of choice in New York city, where he practiced his profession. In order to acquire a knowledge of French and German and to continue his professional studies, he went abroad. While at Paris he became acquainted with Clarice Marie Le Gars, the complainant. He married her and they acquired a matrimonial domicile in France, according to the rules of Conflict of Laws. At the time of his departure for Europe, and also at the time of the marriage and settlement of the married pair at Paris in France, he owned considerable personal property in Connecticut, which he left in the United States in charge of another person. Harral lived in Paris a few years, returned to the United States, and died in Pennsylvania, leaving a will giving all of his property to his brothers and sisters. His French wife brought suit against the legatees and also the executors of the will to get possession of what she claimed was her portion of the Harral personal property.

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(1) 39 New Jersey Equity, 279.

§ 76. **Same: (continued).** By the law of France, which the court found was the matrimonial domicile of the pair, a wife acquired an equal interest with her husband in all the property he had at the time of the marriage. She laid claim to one-half the personal property in the possession of the executors, which was the same property her husband had when they were married. The court held the wife was entitled to have an equal part of the property in the hands of the executors, and, in stating that the law of the matrimonial domicile determined her rights and not the law of the place where the property was situated, it said: "Mr. Wharton says that the place of the celebration is not necessarily the place of performance of the marriage, which, he says, the later jurists have agreed is its true legal site, and that this place of performance is the matrimonial domicile to which the husband and wife propose to repair. . . . On the marriage, the legal presumption is that the wife takes the domicile of her husband, and her rights are subject to the law of his domicile; but that presumption is overcome, and the legal inference is superseded, when, on the marriage, the parties adopt a place for their matrimonial domicile—in which event the matrimonial domicile will control, and will regulate the property rights of the parties in movables. The authorities are quite generally in accord in selecting the matrimonial domicile as the place which shall furnish the law regulating the interests of husband and wife in the movable property of either, which was in esse when the marriage took place." The law of the matrimonial domicile controls also as against the law of the place where the marriage was celebrated.

§ 77. **Same: Property acquired after marriage.** One of the leading cases on this branch of the law, defining what nation shall supply the law for determining what the interests of husband and wife are in property acquired during coverture, is Saul v. His Creditors (2). In that case Saul and his wife were married and lived in Virginia, taking up their matrimonial domicile there. After about twenty years they moved to Louisiana. Whether they took any property with them from Virginia is not disclosed. While living and having their domicile in Louisiana, a large quantity of property was acquired by them. Thereafter the wife died and later still the husband became insolvent. By the law of Virginia, where the matrimonial domicile was taken up, the husband became the owner of all gains made during marriage. By the Louisiana law, the domicile of choice, the gains were divided equally between husband and wife. Each was entitled to a share to be held independent of the other. Saul became insolvent. The children claimed one-half the property held by him, in the right of their mother, from the insolvent estate. The contention made against this claim was, that, as the marriage took place in Virginia, by whose laws no community of gains was permitted, the whole of the property acquired in Louisiana belonged to the husband and thus, in the end, to the insolvent estate for the benefit of the creditors. The court held that the wife had a share in the Louisiana gains and that the Louisiana law, the law of the domicile of choice, should control the marital rights in those gains, and not the law of their

(2) 5 Martin N. S (La.), 569.

former domicile under which she would have had no interest whatever.

§ 78. **Real estate governed by law of situs.** As to the real estate held by either spouse, the rule is that the law of the place where the land is situated controls, entirely irrespective of the matrimonial domicile or the place where the marriage was celebrated. This is true both as to property held by either at the time of the marriage, and that subsequently acquired by either, whether by gift or otherwise. Thus, if by the law of the matrimonial domicile the husband acquires no interest in the wife's land, held by her at the time of marriage or acquired subsequently, but, by the law of the foreign state where the land is situated, he is entitled to one-half of it in fee, he would take, in either case, a half interest in fee in his wife's land. As a general rule the law of the state where the land is situated supplies the rule for the determination of the respective marital rights of the spouses therein.

§ 79. **Effect of change of domicile upon marital property rights: Personalty.** In Louisiana, the community property interests give to the husband one-half the personal property of which the wife is the owner at the time of the marriage. If the wife, in Louisiana where the married pair took up a matrimonial domicile, owned $50,000 in stocks and bonds, the husband would become the owner in his own right of $25,000. If they should subsequently acquire a domicile of choice in a nation where the husband took all the wife's personal property upon marriage, the change of domicile to such a nation would not affect the interest of the wife in the $25,000 still remaining her own by the law of the matrimonial domicile. If the entire

$50,000 had become the husband's or had remained entirely the separate property of the wife, by the law of the matrimonial domicile, the ownership would remain the same, although a different rule might be applied in their succeeding domicile of choice. As a general rule, therefore, when personal property belonging to the wife becomes the husband's, by the law of their domicile, a subsequent change of domicile will not alter the existing rights of the husband. And, on the other hand, where personal property belonging to the wife remains her separate estate, removal into another state does not affect her rights (3). However, as to acquisitions and earnings of the pair made in the new domicile, the respective rights are governed entirely by the law of that domicile.

§ 80. **Same: Realty.** The rule with reference to land owned by either, whether owned before the marriage or acquired afterwards, is not affected in any way by a change of domicile of the married pair. The laws of the domicile have no influence upon their respective rights in each other's realty, but they are governed entirely by the law of the nation in which the same is situated. Thus, if by the law of the state where the spouses are domiciled, the husband is entitled to the rents and profits of the wife's land, but, by the law of the state where the land is situated, she is entitled to the rents as her individual and separate property, the law of the state where the land is situated controls.

§ 81. **Summary.** From this chapter it appears that the law, for settling between husband and wife their re-

(3) Bond v. Cummings, 70 Maine, 125.

spective rights in the property each had at the time of the marriage, is supplied by the matrimonial domicile, if the property involved was personalty. If they change their domicile and acquire property, the law of the new domicile is applied to fix their rights in this newly acquired property, but it does not in any way change the interests they have acquired under the law of their prior domicile. The law of the place where the immovables each owns are situated, fixes their rights in those properties.

CHAPTER V.

DISTRIBUTION OF PROPERTY AFTER DEATH.

§ 82. **Scope of chapter.** In the two preceding chapters the rights of living persons in contracts and property were given attention. This chapter will deal with the rights of persons in succeeding to the property of deceased persons. The problem will be to determine what nation shall settle the rules for the distribution of intestate property, and what nation shall pass upon the validity of wills of property in general, and the capacity of persons to make them.

§ 82a. **Nature of problems involved.** An owner of property may die leaving a will. If valid, the distribution of his property is effected accordingly. On the other hand, he may die without having made a will, or the will he made may be found to be void, wholly or in part. As to any part of his property undisposed of by a valid will, he is said to have died intestate. In such event the question immediately arises, who, under the law, are the distributees of his property. He may have been the owner of real and personal property situated in the state of his domicile, or he may have had such property situated in a foreign nation in which he was not domiciled. Where the property is situated at the domicile no question of conflict of laws can arise, as the law of the domicile and the law of the place where the property is situated are the same.

It is only where the intestate owned property, whether

real or personal, in some other state than that of his domicile, that questions arise, and then only when the rules of distribution differ in the two. In such a case it may be urged by those whose interests are favored by the rules of distribution of the domicile that the law of the domicile should be applied; and, on the other hand, it may be urged by those whose interests are favored by the law of the state where the property is located that its rules should be applied.

Section 1. Intestate Succession.

§ 83. Intestate succession to personal property governed by law of domicile. A well-settled rule has been established as a result of conflicts that have arisen in cases where one died intestate leaving personal property in a state not his domicile. In such a situation the rule has been almost universally applied that the law of distribution provided by the domicile of the intestate controls, as against the rule provided by the nation where the property is situated.

In Lawrence v. Kittredge (1) the intestate had his domicile in Vermont. He had an estate there, but also had a claim of $1,000 against a person residing in Connecticut. The question arose as to whether Connecticut or Vermont should supply the rule for the distribution of the $1,000 and determine what persons should have it. By the law of Vermont, where the intestate was domiciled, the brothers and sisters of an intestate of the whole and half blood were entitled equally to the personal property. By the law of Connecticut the half blood could not take any inter-

(1) 21 Connecticut, 576.

est. It was contended by the whole blood brothers and sisters, there being no other heirs of the deceased, that the Connecticut law, where the property was situated, should apply and thus exclude the half bloods from any interest in the property. The half bloods took the position that they had a right to a part of the $1,000, as the law of the domicile of the deceased and not the law of the place of the property controlled. The court applied the law of the domicile, and, quoting from another case (2), said: "It certainly is now a settled principle of international law that personal property shall be subject to that law which governs the person of the owner, and that the disposition, distribution of, and succession to personal property, wherever situated, is to be governed by the laws of that country where the owner or intestate had his domicile at the time of his death."

§ 84. **Same: Exception by statute of situs.** It is to be noted, however, that the above rule is subject to an exception where the law of the state where the property is situated expressly commands that even as to the property of persons domiciled beyond its jurisdiction, its rules shall apply. As stated by the court in the case cited above: "It is in the power of every sovereignty, and within the constitutional powers of the states of this Union, to repudiate this salutary doctrine in its application to themselves, or to modify it for what they may suppose to be the protection of their own citizens; but, without some peculiar necessity, it cannot be supposed that any well regulated government will do it." The state of Illinois, for example, has an express statute regulating such cases,

(2) Holcomb v. Phelps, 16 Connecticut, 127.

and, by its provisions, the rule of distribution of the personal property of intestates domiciled elsewhere is supplied by Illinois (3).

§ 85. Intestate succession to real estate governed by law of situs. If, by the law of the nation of the domicile, an intestate's widow would be entitled to one-third of his land for her life, and the children of the deceased entitled to the rest, and, by the law of the nation where the land was situated, she would be entitled to one-half the land in fee simple, and deceased's children the other half in fee, then the law of the place where the land was situated and not the law of the domicile would control. The widow in such a case would take one-half the real estate in fee, and the children the other half. This rule is applicable as well to chattels real as to real estate. By chattels real is here understood leasehold interests in land. In fact, this rule applies to any interest in property which in law is deemed an immovable. If, by the law of the nation where an intestate's leasehold interest in land is situated, the property goes to the widow, but, by the law of the intestate's domicile, it passes to his children, the law of the place where the land or leasehold interest in it is situated will supply the rule of devolution (4).

SECTION 2. TESTATE SUCCESSION.

§ 86. In general. An owner of property has a right, under the law, to indicate whom he desires to be the distributees of his property. This he may do in his will. If the will is executed as required by law, and if its provi-

(3) Cooper v. Beers, 143 Illinois, 25.

(4) Duncan v. Lawson, 41 Chan. Div., 394.

sions violate no rule that renders them void, they will be carried out by the courts and the rules of intestate distribution provided by law will be superseded. In determining the validity of the execution of a will and of its provisions, conflicting laws may seem applicable, owing to the fact that the testator may be in one nation and his property in another, or owing to the fact that he may execute his will in accordance with the law of his residence, instead of in accordance with the law of the domicile or of the location of the property. It is the purpose of this section to determine in accordance with what law it must be executed and its provisions tested.

§ 87. **Execution of will of personalty: Law of domicile governs.** In Gilman v. Gilman (5) a testator originally resided in the state of Maine. He had a residence there which he kept furnished and equipped, and to which he resorted at times. He acquired a residence in the city of New York and had his place of business there. He made his will in New York, and died in Maine at his residence. He had property both in Maine and New York. Under such a set of facts the court said: "If the domicile of the testator, at the time of his death, was in New York, then his will should be allowed and recorded in this state as a foreign will. . . . And, in that case, the movable property in this state would be disposed of, under the will, according to the laws of the state of New York. . . . But, if his domicile was in this state, then the probate court here has original jurisdiction, and our laws must govern the construction of the will and the dis-

(5) 52 Maine, 165.

posal of the property." If Maine had been the residence, then New York would have provided the law for the disposal of the property under the will; on the other hand, if New York had been the residence merely and Maine the domicile, then Maine law would govern. The court held that he was domiciled in Maine and merely had a temporary residence in New York. Under such circumstances the Maine law, the law of the domicile, would control as against the law of New York, the state of the mere residence.

§ 88. **Same: Law of domicile at time of death governs.** In Moultrie v. Hunt (6), the deceased was domiciled in New York at the time of his death. His prior domicile had been in South Carolina. While domiciled in South Carolina he executed a will, and, at the time of the execution, he merely stated to the subscribing witnesses that his signature and seal were affixed to the document that he requested them to subscribe. He subsequently abandoned that domicile and took up a domicile in New York, but did not execute another will in accordance with the law of New York. That law required the testator to state, at the time of subscribing his will or at the time he acknowledged it, in the presence of at least two attending witnesses, that it was his last will and testament. The question arose whether this will was valid to pass personal property of the deceased. The court held it was not. The deceased was domiciled in New York at the time of his death, and personal property could be willed by him only in case his will was executed in accordance with the law of New York. This is the rule, entirely

(6) 23 New York, 394.

regardless of where the property is situated, and of the law of the place where the will was actually executed. The court, quoting from Story's Conflict of Laws, said: "But, it may be asked, what will be the effect of a change of domicile after a will or testament is made of personal or movable property, if it is valid by the law of the place where the party was domiciled when it was made, and not valid by the law of his domicile at the time of his death? The terms in which the general rule is laid down would seem sufficient to establish the principle that, in such a case, the will and testament is void; for, it is the law of his actual domicile at the time of his death, and not the law of his domicile at the time of his making his will and testament of personal property, which is to govern." In such a case, where the will is ineffectual because improperly executed, the distribution in the will is ignored and the rules of intestate succession become operative.

§ 89. **Execution of will of realty: Law of situs governs.** In Robertson v. Pickerell (7) a will was relied upon to establish a title to a tract of land situated in the District of Columbia. That District is governed in the matter of execution of wills of realty by the law of Maryland. The will was executed in Virginia and admitted to probate in its court. By the proof produced at the trial it was merely shown that the will was written by the testator in his own handwriting and his signature was identified. There was no evidence which tended to show that any persons witnessed the signature, nor how many, if any, did so. By the law of Maryland three subscribing witnesses were required to make a will of real estate in

(7) 109 United States, 608.

the District of Columbia. The court held the Virginia will was ineffective to pass the land, saying: "It matters not how effective the instrument may be to pass real property in Virginia; it must be executed in the manner prescribed by the law in force in the District to pass real property situated there, and its validity must be established in the manner required by that law. It is familiar doctrine that the law of place governs as to the formalities necessary to the transfer of real property, whether testamentary or inter vivos."

§ 90. **Same: Contrary rule by statute of situs.** Some states have passed statutes, under which a will is not required to be executed in accordance with their law in order to devise real estate situated in their boundaries. It is sufficient under such statutes that the will be admitted to probate in some foreign state. If so, it may be recorded in the state where the land is, and thereupon it is effective to pass real estate situated there (8). General statutes of this character would greatly simplify the matter of the proper execution of wills of real estate and would tend to lessen intestacies of such property arising from insufficient execution.

§ 91. **Capacity of person to devise realty governed by law of situs.** In Carpenter v. Bell (9) a will was executed by a married woman domiciled in Kentucky. By the law of that state a married woman had not the capacity to execute a will of real estate. But the land was located in Tennessee, by whose laws a married woman could make a will

(8) Amrine v. Hamer, 240 Illinois, 272.

(9) 96 Tennessee, 294.

of her real estate. It was contended that the law of Kentucky controlled and that the will was void. The court said: "This contention is unsound, as is well settled by the authorities. As to immovable property, the rule is that the law of the place of the property governs, as to the capacity or incapacity of the testator, the extent of his power of disposition, and the forms and solemnities necessary to give the will its due authority and effect."

§ 92. **Revocation of a will.** The revocation of a will may be accomplished in many ways: by marriage after the execution of the will; by the execution of another will expressly revoking it; by destroying it; and other ways provided by statute. But these methods differ in different states, and it becomes an important question at times what law shall govern in determining whether a revocation of a will has been accomplished. To illustrate: By the law of England a subsequent marriage revokes, but by the law of France it does not. Is the effect of the marriage in accomplishing a revocation to be determined by the law of France, where testatrix was domiciled when she was married, or by the law of England, where she was domiciled when she died? It is assumed that a will of personal property was made before the marriage and no later will. The rule is that the law of the domicile at the time of the death is to decide whether the alleged revocation was effective. In the instance given, the English law would control, and would accomplish a revocation (10). As to real estate, however, the law of the place of its location determines the effectiveness of the attempted

(10) In re Coburn's Will, 30 New York Supp., 383.

revocation. If by that law it was accomplished, then the will is deemed revoked everywhere.

§ 93. **Estate devised governed by law of situs.** The principle here involved can be best understood by a study of a concrete case. Assume that the testator is domiciled in Minnesota, and that he owns a tract of land in Illinois. Assume the devise reads "to A for life and upon his death to his heirs." Assume also that in Illinois the rule in Shelly's case is applied, and that by its application A would get the absolute title to the land at the testator's death. Also assume that by the law of Minnesota A would get only a life estate, and that a remainder would pass to A's heirs, who would be ascertained only at his death. In such a situation if the law of Illinois were applied to the title, A would get a fee simple title; if the Minnesota law applied he would get only a life estate. The rule of Conflict of Laws in such a case permits the quantum of A's estate to be determined by the law of the location of the land (11). A similar case arises where a deed conveys title to another without using the word "heirs" to designate the estate granted. If by the law of the domicile such a grant would convey a fee simple, but by the law of the state where the land is situated a life estate only would pass, the latter will control.

§ 94. **Interpretation of will governed by law of domicile at time of execution.** The leading case on this subject is Staigg v. Atkinson (12). Testator owned land in Minnesota, was domiciled in Rhode Island when he executed his will, and in Massachusetts when he died. It

(11) Pratt v. Douglas, 38 New Jersey Eq., 516.

(12) 144 Massachusetts, 564.

became material in the case to determine what the testator meant by giving his wife a portion of his real estate in the will. By both the Minnesota law and the Rhode Island law a devise to her was interpreted by the courts to be in addition to her common law dower interest. By the Massachusetts law the devise was interpreted to be in lieu of dower. She laid claim to a dower interest in the Minnesota land, and it was contended against her that the law of Massachusetts controlled. The court held that she could get her dower interest in addition to the portion she took by devise. The court held that either the law of the domicile at the date of the execution of the will, or the law of the location of the land should control, but did not distinctly state which. It would seem, on principle, that the law of the domicile should control.

§ 95. **Validity of devise of land governed by law of situs.** In Duncan v. Lawson (13) the testator, who was domiciled in Scotland, willed certain real estate situated in England to charities. By the English law gifts to charities were at that time prohibited. The court decided the case on the ground that the validity of the gifts of the land situated in England should be determined by the law of England. The case is one of a class of cases showing that the effect and validity of the provisions in a will of realty are to be determined always by the law of the nation where the realty is located, and not by any other law, even though testator was domiciled in some other nation.

(13) 41 Ch. Div., 394.

CHAPTER VI.

JURISDICTION OF COURTS.

§ 96. **In general.** From the preceding chapters it has been seen that there is a distinct set of rules by which to ascertain which of two or more nations shall supply the law for the regulation of men's rights and duties toward each other. The intermingling of people of different nations from the earliest times has compelled the courts to pass upon such questions. As a result of a number of adjudications, a body of law has grown up which is recognized more or less generally by all nations. It is not a code taken from the laws of one nation, or of many nations. It is not based upon the legislation of any law-making body, but upon the decisions of courts; and it has the same binding force under our system of law as is given to any other part of our unwritten, judge-made common law. The rules laid down have stood the test of experience, and generally appeal to the reason.

As there is a body of rules determining which nation shall provide the law by which particular rights are to be regulated, so there is also a body of rules, part of the law of Conflict of Laws, determining which nation's courts shall pass upon particular controversies between individuals. These rules concern the jurisdiction of courts from the standpoint of private international law. They are entirely distinct from the body of law we have already

examined, and the present chapter will be devoted to their discussion.

Section 1. Personal Judgments.

§ 97. Mode of serving process: Defendant domiciled in state. To give the court of any state the power to pass upon a controversy, for the purpose of rendering a plain money judgment, it is essential that it procure service of process upon the defendant. It must serve him in the state where the court is sitting. This will be more fully discussed hereafter. As to its own citizens a state has a wide range of means of giving the defendant notice. It may provide for actual service of a writ upon him in person; it may provide that service be made by leaving a copy of the summons with some member of his family; it may provide that the notice be tacked on the outer door of the defendant's home. Courts have upheld, and correctly, service of notice upon its resident inhabitants by making a publication in a newspaper. In Nelson v. Chicago, Burlington & Quincy R. R. Co. (1) an action for a tort was brought against the railroad. It was served by publication and mailing as provided by statute. On appeal it was contended that the statute was void as to the method of service, and that the notice it provided was unreasonable and unconstitutional. The court held that any method designed to give reasonable notice was sufficient, and upheld the constitutionality of the act.

§ 98. Same: Temporary absence of domiciled defendant. The rule stated above applies even to persons domiciled in a nation, who are temporarily beyond the

(1) 225 Illinois, 197.

boundaries. If a method of service for residents is provided, such that their actual presence is not necessary to receive it, service in the manner provided is deemed effective for a valid judgment. In Douglas v. Forrest (1a) a debtor, a native of Scotland, contracted debts and went to India. He was there when he was sued in Scotland. The service, following the method there provided, consisted of proclamations made at the market cross of Edinburgh, and at the pier and shore of Leith. The creditor procured a judgment and afterwards sued on it in England. Its validity was attacked, on the ground that there had been no service. The court, however, held that the judgment was valid, inasmuch as the debtor was still domiciled in Scotland. The case shows that, as a matter of Conflict of Laws, the court of the nation where the debtor is domiciled has jurisdiction, though he be temporarily in another nation, to serve him and enter a valid personal judgment against him. A judgment entered under such conditions, where the defendant has not permanently abandoned his former domicile, will be recognized by the courts of all nations.

§ 99. **Same (continued).** The principle is also illustrated by an American case where the defendant, though domiciled in California, was, at the time he was sued, temporarily in Massachusetts, but had not finally abandoned California as his domicile. The court held the judgment, entered against him on service in accordance with the California law, valid. It said: "The defendant was not in California when the action was commenced

(1a) 4 Bing. 686.

against him there; nor at any time during its pendency. No service of process or notice was ever made upon him personally. . . . But he had been, for a long time before that, a citizen of California; the contract was made there; and that continued to be his legal domicile when the judgment was rendered. He was, therefore, upon principles of international right, subject to the laws, and to the jurisdiction of the courts of that state'' (2). This judgment was recognized as valid and binding against him by the Massachusetts court.

§ 100. **Same: Domicile abandoned by defendant.** But, on the other hand, where the domicile remains merely because no new one has been acquired and the defendant has left the state permanently, a judgment by service on him in a permanently abandoned domicile is not valid (3).

While such a domicile, as was seen above (4), would supply the rule for the distribution of his personal property on his death without a will, and the method for executing his will bequeathing personal property (5), it would not give a court jurisdiction to enter a judgment.

§ 101. **Same: Non-domiciled absent defendant.** Where, however, the debtor is not domiciled in the state, service in his absence is ineffective to give the court jurisdiction of the person, so as to render a binding judgment against him. In Buchanan v. Rucker (6) a judgment was taken

(2) Henderson v. Staniford. 105 Massachusetts, 504.
(3) De La Montanya v. De La Montanya, 112 Cal., 101.
(4) §83.
(5) §§87, 88.
(6) 9 East, 192.

in the island of Tobago, against a person who had never been in the island, by tacking the summons on the court-house door. This was the only notice he received. In a suit on the judgment in England the court held it was void for lack of proper service. Although the service was in accordance with the laws of the island, it was insufficient as a matter of private international law to admit of basing a personal judgment upon it. The case shows forcibly that, to comply with the requirements of the rules of Conflict of Laws, it is not sufficient to follow the requirements of any single state. The conditions which would give the court of such a state jurisdiction to render a judgment, valid there, would not necessarily comply with the dictates of Conflict of Laws; if not, then the judgment is void in foreign states, though it may be valid where rendered. Schibsby v. Westenholz (7) was a very similar case. A Frenchman sued a resident of England, who had never been in France, in a French court. He procured service on him in accordance with the French statute, by serving the summons on a French official designated to accept service in such cases. An action was brought in England on the judgment recovered in France. The English court refused to recognize the validity of the service of process and would not permit the judgment to stand.

§ 102. **Mode of serving process on corporations.** The validity of a judgment, procured in a state in which defendant is not domiciled, is frequently raised in connection with service of process upon corporations. As a

(7) 6 Queen's Bench, 155.

rule, corporations may be sued and served as natural persons may. Thus, in Nelson v. C. B. & Q. R. R. Co. (8), a railroad company incorporated in Illinois, where the suit was brought, sought to escape service, procured on it by publication of notice in a newspaper, on the ground that the statute did not provide for reasonable notice. The court held, however, that the statute was constitutional, the notice reasonable, and the service valid. The underlying principle governing such a case is very similar to that in the case of Douglas v. Forrest (9). Corporations must submit to forms of notice that are reasonable, and private individuals are governed by similar requirements.

§ 103. Same: Service on agents beyond domicile. At an earlier period in American law it was impossible to serve a corporation outside of the incorporating state. Modifications of this rule have been made, until it is now possible to serve a corporation outside of its domicile by serving some officer or agent, who appears in the state on business for the corporation. It is, however, essential that he should be there on the corporation's business, and service on an agent in a foreign state who is accidentally there, and who has no authority to represent the corporation there, is not valid to bind the corporation. As was stated by the court in a case (10): "When service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that

(8) 225 Illinois, 197.

(9) See §98, above.

(10) St. Clair v. Cox, 106 United States, 350.

it should appear somewhere in the record—either in the application for the writ, or accompanying its service, or in the pleadings or findings of the court—that the corporation was engaged in business in the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business".

§ 104. **Domicile of defendant may supply court for suit.** The preceding cases suggest a rule of Conflict of Laws to the effect that the court of the nation where the defendant, in a suit for a personal judgment, is domiciled is the proper court in which to take judgment in case of his temporary absence. As will be shown later, it is not the only court. If the defendant leaves his domicile and goes into the plaintiff's domicile and is there served, the judgment will be good (11). It is essential that the defendant be subject to the court's jurisdiction, either because domiciled there, or because he came there voluntarily and was served while there. That this is the rule is not merely left to inference from Singh v. Rajah of Faridkote (12), but the court there expressly said that "the plaintiff must sue in the court to which the defendant is subject at the time of suit."

§ 105. **Judgment based on foreign service of process is void.** If a defendant to a proceeding is domiciled in a nation, even though absent temporarily, and that nation serves him with process properly, a judgment rendered

(11) §107, below.

(12) [1894] Appeal Cases, 670.

against him is valid. But the service cannot be made beyond the territorial jurisdiction of the court. In Permanent Building Association v. Hudson (13) the plaintiff brought suit in the state of New South Wales in Australia, against Hudson, a citizen and inhabitant of the state of Queensland. The officer did not find him in New South Wales, but served him in Queensland, beyond the boundaries of the state in which the court was sitting. A judgment was entered on the service and the plaintiff sued on it in Queensland. The court of that state held the judgment invalid, saking: "International law does not, as far as I know, require any country to recognize the jurisdiction or authority of any foreign body or tribunal over its citizens, or over any one who was not a citizen of the country within which that foreign body or tribunal has jurisdiction. Writs in New South Wales run as far as the border of New South Wales and no further. Beyond that they are mere pieces of paper—mere notices. . . . This judgment, therefore, was obtained in the supreme court of New South Wales against a person who owed no allegiance to that court. The document served on him was only a piece of paper, to which, in my opinion, he was in no way bound to pay attention, and which had no effect in this colony."

§ 106. **Same: Further illustration.** In Isett v. Stuart, (14) John M. Stuart brought a suit in Illinois against Thomas M. and Edward B. Islett, to set aside a mortgage from the former to the latter, on the ground that it had been made in fraud of creditors. Stuart was an assignee

(13) 7 Queensland Law Journal, 23.

(14) 80 Illinois, 404.

in bankruptcy of Thomas M. Isett, appointed in a proceeding brought against him in New York. The officer served the bankrupt personally in New Jersey, beyond the territorial jurisdiction of the court sitting in New York. Edward B. set this fact up as a defense to the proceeding to set aside the mortgage. His theory was, that, if the New York court had not obtained jurisdiction of Thomas M. and had appointed an assignee, the appointment was void, and as a result the assignee was powerless to bring a suit as assignee. The court of Illinois held that the suit must be dismissed, as Stuart had not been appointed assignee of Thomas M., the court that appointed him not having obtained jurisdiction of the bankrupt because the writ was served beyond the territorial jurisdiction of the court.

§ 107. Judgment based on actual service on foreigner in jurisdiction is valid. While a court cannot get jurisdiction, for purposes of a personal judgment, upon a person in another nation, by sending its officer to that nation to serve him with process, it can get jurisdiction of him if he comes into the territory and is served there. The mere fact that he is domiciled in a foreign nation, and chooses to go into the nation where he is served does not give him immunity from service of process. In Darrah v. Watson (15) a suit was brought in Iowa on a judgment of a Virginia court obtained under the following circumstances: Watson was a resident of and domiciled in Pennsylvania. He went temporarily into Virginia where the court was sitting, and while there was served

(15) 36 Iowa, 116.

with process. He did not appear to defend, and a judgment by default was entered against him. The court of Iowa recognized the validity of the Virginia judgment and gave a judgment upon it. This principle is generally recognized among the different states. A judgment of a court of a nation where the defendant was personally served with process, while temporarily there, is binding upon him internationally, although he was not domiciled there.

From the discussion in this Section it appears that judgments are valid when rendered by a court of the nation where the defendant is domiciled, although temporarily absent (if service in his absence can be and is properly made); and also when based upon service upon a defendant not domiciled in the jurisdiction, but merely there temporarily.

§ 108. **Same: Exception in case of trespass to land.** In British South African Co. v. Companhia De Mocambique (16) the plaintiff company brought suit in England to recover damages it had sustained by the defendant company trespassing upon land it owned in South Africa. The point was raised that the English court could not decide the case, and that the only nation which could provide the court was South Africa. It was held that the English court had no power to give a judgment for the damages. This is the rule with reference to damages to land. The only nation to supply the court is the nation where the land is situated. There is but a single case which holds a contrary view, and in that there was a dissenting

(16) [1893] Appeal Cases, 602.

opinion adhering to the established rule. In Little v. Railway (17) an action was brought in Minnesota by Little to recover damages that the railway had done to his land situated in Wisconsin. The court gave a judgment for Little, but, in doing so, it recognized fully that it was departing from long-established precedent. It said: "Almost every court or judge who has ever discussed the question has criticised or condemned the rule as technical, wrong on principle, and often resulting in a total denial of justice, and yet has considered himself bound to adhere to it under the doctrine of stare decisis. We recognize the respect due to judicial precedents, and the authority of the doctrine of stare decisis; but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice, and has been so generally criticised by eminent jurists, we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor."

If the general rule be adhered to, then this class of proceedings to get personal judgments is an exception to the rule that the nation where the defendant can be found may supply the court to determine a controversy over a mere money claim. This exception is itself generally qualified by another exception, to the effect that where the defendant does an act in one state that injures land in another state, he may be sued for trespass in either state obtaining jurisdiction of him (18).

(17) 65 Minnesota, 48.

(18) Miller v. Rickey, 127 Fed., 573.

SECTION 2. PROCEEDINGS IN REM OR QUASI IN REM.

§ 109. **In general. Courts of situs.** While the nation in which a person is physically present may supply the court to determine personal controversies to which he is a party, as shown above, merely because he is present and is served with process, that is not the only basis for permitting a nation to supply the tribunal for such suits. It may supply it because the defendant has property there and cannot be found there himself. Whether he is domiciled there or not, two forms of proceedings may then be taken. These are known as proceedings *in rem* and *quasi in rem,* depending upon whether the main purpose is to cut off the foreigner's property right altogether, or to get a judgment and incidentally apply the property to satisfy it. This distinction will be more fully shown by illustrative cases, which it is the purpose of this Section to discuss, as well as to show what nation may provide the tribunal in which to institute such proceedings. The courts of the nation where the property to be affected is physically present are called "courts of the situs" (See § 66, above).

§ 110. **Courts of situs have jurisdiction over ships anchored there.** The commonest and most ancient form of a proceeding strictly in rem is that of a suit against a vessel by those having a claim against it. In the case of The Belgenland (18a) the Belgian vessel of that name ran down a Norwegian vessel called Luna and injured her. The master of the Luna, on behalf of her owners, brought suit against the Belgenland to recover the damages sus-

(18a) 114 United States, 355.

tained in the collision. The question was raised whether the United States could supply the court to pass upon the controversy. The court stated that there was no doubt of its power, as the property, the Belgenland, sought to be taken and sold to satisfy the claim, was in its territorial jurisdiction. In maritime controversies the injured party frequently can conveniently procure redress against the owner of the vessel that did the injury only in this way. The party injured may be domiciled in one nation, the vessel be from another, and her owner be domiciled in still a third. This proceeding against the ship, wherever she may be, gives to the party injured by her a remedy, regardless of the fact that her owners are domiciled elsewhere. Courts are at times reluctant to pass upon a case against a ship, when the owners of the injured ship and the one that did the injury are all foreigners, but, in the case against the Belgenland, the court assumed jurisdiction and decided the case.

§ 111. **Courts of situs have jurisdiction of foreign claims to property.** The question has frequently arisen, which of two nations may provide the tribunal to pass upon questions affecting the title to land situated within the boundaries of one of them, where the party asserting the claim of title was in the other.

Thus, in Arndt v. Griggs (19) the court was asked to pass upon the validity of a non-resident's claim to land situated in Nebraska, within the territorial jurisdiction of the court. The object of the proceeding was not to get a judgment for money against the non-resi-

(19) 134 United States, 316.

dent claimant, and to have it satisfied out of property in the court's territorial jurisdiction, but merely to obtain a determination that the interest he asserted was invalid, and a declaration that it was non-existent. It was contended that the court had no power to do this without the personal presence of the party setting up the claim. This contention was made, although a statute providing for such a proceeding existed in Nebraska. This, it was asserted, was unconstitutional, because the notice provided for was unreasonable, being by publication merely. The court stated the contention thus: "Has the state the power to provide by statute that the title to real estate within its limits shall be settled and determined by a suit in which the defendant, being a non-resident, is brought into court by publication? . . . What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate?" It decided that the state had the power to supply the court to pass upon controversies respecting titles to land within its borders, even though the party against whom its decision might be given was a non-resident, saying: "The court cannot bring the person of a non-resident within its limits—its process goes not out beyond its borders, but it may determine the extent of his title to real estate within its limits; and, for the purpose of such determination, may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there

be convenient and certain methods of determining any unsettled questions respecting it."

§ 112. **Courts of situs may enforce foreign contracts regarding land.** A problem similar to that mentioned above arises where an inhabitant of a foreign nation has agreed to sell land situated in the territorial jurisdiction of a court and then refuses to carry out the contract. The question of Conflict of Laws presented is, which nation shall supply the court to enforce it: the nation where the land is, or the nation of which the contractual vendor is an inhabitant? The courts have held that, under proper statutory authority, the courts of the nation where the land is situated may properly compel a specific performance of the contract, and, if the vendor does not appear, may appoint some one to execute a deed on behalf of the vendor. Similarly, if an inhabitant of a foreign state has agreed to buy a tract of land situated in another, the courts of the latter may take jurisdiction to give the vendor a remedy against the land for any unpaid portion of the purchase price. A closely analogous situation arises where an inhabitant of a foreign nation holds property in trust for another, which the latter desires conveyed to himself. In such a case he is not obliged to go to the nation where the trustee may be found, but, under statutes, may apply to the court of the state or nation where the land is situated and procure a transfer of it to himself. It is recognized as a rule of Conflict of Laws that the nation where the land is situated may supply the court to perfect the transfer.

§ 113. **Courts obtaining personal jurisdiction of vendor of land may compel conveyance.** The nation where the

land under contract of purchase and sale is situated, is not the only nation that may supply the contract-enforcing tribunal. It may be supplied by the nation where the contractual vendor is found. Thus in Penn v. Lord Baltimore (20) Penn and Lord Baltimore had entered into an agreement to settle the boundary disputes existing between them as to the boundary between Pennsylvania and Maryland. Each had agreed to convey to the other his interest in certain lands. Lord Baltimore refused to carry out his agreement, and Penn sued him in an English court of equity to compel him to perform the contract. It was contended by Lord Baltimore that the English court had no jurisdiction to compel him to convey lands lying in America. The court held that it had such power, when it had before it the person whose duty it was to make the conveyance. It could compel him to execute a deed to the lands entirely regardless of where they were situated.

§ 114. **Courts obtaining personal jurisdiction of trustee may compel conveyance of trust property.** A cestui que trust may compel his trustee to convey lands located beyond the jurisdiction of the court. In Massie v. Watts (21) a suit was brought by Watts, a citizen of Virginia, to compel Massie, a citizen of Kentucky, to convey to him the title to a tract of land situated in Ohio. Watts had contracted to buy the land of a third party and Massie knew of the contract. The title had not yet been conveyed, when Massie bought the land of the third party and procured a conveyance of the title to him. It

(20) 1 Vesey Sr., 444.

(21) 6 Cranch (U. S.), 148.

was objected that the court had no power to compel Massie to convey title to land in Ohio. Upon the theory, that, when Massie took title knowing the rights of Watts, he became a trustee thereof for Watts, the court compelled him to execute a conveyance to Watts.

§ 115. Distinction between proceedings in rem, in personam, and quasi in rem. In the discussion of this Section so far, it may be noted that the nature of the proceeding has in every case been to cut off an interest in property. Thus, in the suit to quiet title to land, a claim was asserted by the moving party that the opponent had no interest and a decree to that effect was sought. The primary object was to cut off the adverse interest that might otherwise be asserted. In the case where a contractual vendee of land procures relief, the sole object of the proceeding is to deprive the vendor of any interest he has in the title to the land involved in the contract. No personal money judgment is sought against the vendor. Where the cestui que trust sues to compel a foreign trustee to convey title to him, the sole object of the proceeding is to cut off the title of his trustee. Other similar cases could be instanced, where the object of the proceeding is simply to procure a declaration of the rights between the parties to a controversy in certain property in the territorial jurisdiction of the court. Where that is the object and the only other accompaniment of the proceeding is to cut off that right or to establish it against the moving party, then the proceeding is a proceeding *in rem*.

If, however, the proceeding has for its object merely a declaration that the defendant is bound to do or to re-

frain from doing a certain act, not involving a judgment for the payment of money, then the proceeding is a proceeding *in personam*. As was shown by the cases of Penn v. Lord Baltimore (22) and Massie v. Watts (23), if the only purpose is to compel a defendant to make a deed or do a similar act, the only nation that can supply the court is the nation where the defendant is found. This is not true, as has been seen, where the purpose is merely to procure a declaration of an interest in property or a decree cutting off a claim to it.

A third form of proceeding is that known as a proceeding *quasi in rem*. Instances of this kind of a proceeding will follow. It will be noted in those proceedings that the purpose is twofold: First, to procure a finding that a certain sum of money is due the moving party; second, to apply certain property in the possession of the court to the payment of the amount found due. The property is placed in the court's possession by virtue of its being attached by its officer, and, consequently, the proceeding is commonly called an attachment or garnishment proceeding. The remaining portion of this Section deals with proceedings quasi in rem and ascertains what nation may supply the tribunal in which to bring them.

§ 116. Extra-territorial attachment by a court is void. In Sutherland v. Second National Bank (24) the plaintiff brought suit in Kentucky and attached a carload of oats in possession of a Kentucky railroad, whose line extended through portions of both Illinois and Kentucky.

(22) §113, above.

(23) §114, above.

(24) 78 Kentucky, 250.

At the time the suit was brought and the attachment levied, the oats were on their way to Kentucky, but were still in Illinois. The defendant was a non-resident and had not been served with process. The court held that although the railroad, in whose possession the oats were, was in Kentucky, the property sought to be reached was without its jurisdiction, and the process of the Kentucky courts could not reach it nor subject it to an attachment. The courts of one state are powerless to seize upon property in another. The principle is closely allied to the inability of courts of one state to serve a defendant who is at the time of service in another (25). The court can no more send its officers beyond its boundaries to seize property, than it can to serve a defendant with process. The officer's power ceases at the state line. For this reason its power over both fails.

§ 117. **Domestic attachment of non-resident's property necessary for valid judgment quasi in rem.** The leading case upon the subject is Pennoyer v. Neff (25a). The owner of a tract of land situated in Oregon was sued by another upon a demand for services as an attorney. The debtor was a non-resident and he was served by publication. A personal judgment was entered against him, and his land was then for the first time attached under an execution and sold to satisfy the judgment. Subsequently the owner brought a suit against the purchaser at the execution sale for possession. The suit proceeded upon the theory that the judgment under which the land was sold was void for want of jurisdiction of

(25) §§105, 106.

(25a) 95 U. S., 714.

the court. It was claimed that seizure of the property before judgment was essential. The Supreme Court of the United States held the judgment was void. Wherever an attempt is made to give effect in one state to personal judgments rendered in another against non-residents without actual service upon them, that is, merely upon substituted service by publication, or in some other form, the rule is that such judgments are without any binding force, except as to property within the state. To reach and effect this must be the object of the action in which the judgment is rendered, and the property must be brought under control of the court in connection with the proceeding against the person, and before judgment. The Supreme Court recognized the principle of natural justice and the rule of Conflict of Laws underlying this case. It recognized that, even in the absence of the Federal Constitution, a judgment procured without a prior seizure of the property would be of no validity or force in another state. It stated that it was not necessary under the full faith and credit clause that courts should enforce such a judgment, as only the judgments that had the sanction of the requirements of the law of nations could be included in that clause, and also stated that judgments, procured as was the judgment in that case, were invalid even in the state where they were rendered, under the Fourteenth Amendment of the United States Constitution, which prohibits the taking of property without due process of law.

§ 118. **Courts of situs may validly attach domestic property or debt owned by non-resident.** It has been seen that the courts of one state are powerless to attach a non-

resident's property which is situated in a foreign state (§ 116, above). The next inquiry is with reference to the power of a court to attach property situated in the state, where the owner is a non-resident or where such non-resident has a debt due him from a person or corporation within the jurisdiction of the court. In such a case the rule is settled that the court has jurisdiction to seize the property or money, and, after notice by publication, merely, to the non-resident owner, to apply it in payment of the claim. In Chicago, Rock Island and Pacific Railway v. Sturm (26) the plaintiff, a resident of Kansas, sued the company, an Iowa corporation, which also did business in Kansas, on a claim for wages. The company answered that it had been joined with plaintiff as a defendant, in an attachment suit in Iowa brought by a creditor of plaintiff, and that it had paid the same money now claimed to the creditor in the Iowa proceeding. The service on plaintiff in the Iowa proceeding had been by publication of notice in a newspaper. The United States Supreme Court held that the company had authority to pay the money under a judgment procured under the circumstances stated, and that the judgment was such that it must be recognized as of binding force in the courts of Kansas. In the Sturm case the debtor company was permanently located in Iowa, the state in which the judgment in attachment was procured. It has been held the result would be the same even though the debtor were only temporarily in the jurisdiction of the attaching court (27).

(26) 174 United States, 710.

(27) Harris v. Balk, 198 United States, 215.

From the preceding cases it follows that the courts of a state where a non-resident has property, or where proper service is obtained upon a debtor owing him a debt, have jurisdiction to attach such property or to garnishee such a claim, and to apply the property in satisfaction of the attaching and garnishing creditor, even though the owner of the property or claim is in the jurisdiction of a foreign state.

Section 3. Divorce.

§ 119. **In general: Jurisdiction dependent on domicile.** As explained in the preceding Sections, a valid personal money judgment may be obtained in any court that properly serves a defendant with process, even though the latter be found only temporarily in the jurisdiction. A valid judgment concerning property can be given if the property is within the jurisdiction of the court. The rules of law concerning a court's jurisdiction to grant a decree of divorce differ considerably from those concerning its power to render a valid money judgment, or one affecting property. The rules of Conflict of Laws recognize in the jurisdiction of the domicile of either, or perhaps of both, parties an interest in the marriage relation, so intimate, and so important to the state, that the jurisdiction of the domicile is alone competent to sever the marriage relation.

§ 120. **Courts of residence of parties no jurisdiction for divorce: In state where rendered.** The jurisdiction of the residence, where that differs from the domicile, has no authority or power to dissolve the relation of husband and wife. In Le Mesurier v. Le Mesurier (28)

(28) [1895] A. C. 517.

the husband, who was domiciled in England but residing in Ceylon, brought a suit for divorce in Ceylon. His wife was a French woman. The Ceylon court dismissed the suit for divorce. Upon an appeal to the English court, it affirmed the decision of the court of Ceylon, holding that mere residence alone was insufficient to give a court jurisdiction to grant a divorce. In this case the question of the sufficiency of residence to afford jurisdiction to grant a decree of divorce was passed upon. The question of the sufficiency of such a decree, when tested by the rules of private international law, was not raised, as it had not come before any court except the one rendering the decree and its appellate tribunal.

§ 121. **Same: In foreign states under rules of Conflict of Laws.** In State v. Armington (29), the question of the sufficiency of such a decree under the rules of Conflict of Laws was squarely raised. The husband, domiciled in Minnesota, resided temporarily in Utah, and, while a resident there, applied for a divorce. The statute of Utah seems to have been liberal, and the court granted a divorce without requiring that the husband be domiciled there. And it also appeared that the wife was domiciled in Minnesota and had at no time gone into Utah. Upon the husband's return to Minnesota, he was prosecuted criminally on the charge of polygamy, found guilty and sentenced. Upon appeal he contended that his sentence was erroneous because he was divorced from his former wife. To prove this he relied upon the divorce granted by the court of Utah. The court, how-

(29) 25 Minnesota, 29.

ever, held that the decree was ineffective, void, and of no validity as tested by private international law, because the Utah court could not grant a valid divorce, when the husband, the complaining party, was merely a *resident* of the state, and had no more intimate connection with it than that of a temporary sojourner.

§ 122. **Same: Under United States Constitution.** The same principle has been recognized by the Supreme Court of the United States. In Bell v. Bell (30) the parties were married in Bloomington, Illinois. They lived together as husband and wife in Buffalo, New York. The wife, after they had lived together about four years, returned to Bloomington, and thereafter they ceased to live together as husband and wife, but the wife still claimed Buffalo as her residence. The husband went to Pennsylvania and there obtained a decree of divorce against his wife for desertion. The wife, within a year after the divorce was procured, applied for a divorce in the state of New York. The husband pleaded the Pennsylvania decree; the wife set up in answer to it that the decree was void, because the Pennsylvania court had not obtained jurisdiction of the cause. It was shown that at the time the husband applied for a divorce he considered himself a resident of Buffalo, New York; the wife had always retained that residence. The court held that "no valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled" and that the

(30) 181 United States, 175.

court in New York was justified in refusing to recognize the Pennsylvania decree.

§ 123. **Divorce by courts of domicile acquired by offending spouse after marital misconduct.** The leading case on the subject of jurisdiction for divorce is that of Haddock v. Haddock (31) decided in 1906. Mr. Haddock married Mrs. Haddock in the state of New York, where both had been domiciled. Soon after the marriage he deserted his wife, wandered about the country for nine years, and then moved to Connecticut where he took up a domicile and lived there fourteen years. He then instituted proceedings for a divorce, serving Mrs. Haddock, who still remained domiciled in New York, by publication. She did not appear in Connecticut nor defend the case. A decree was granted. After Mr. Haddock had acquired considerable property, Mrs. Haddock brought suit in New York for a divorce and alimony, and served Mr. Haddock personally. He appeared and answered that the state of Connecticut had already divorced them and that an adjudication of the matter had been had. The New York court refused to recognize the decree, and, to compel it to do so, Mr. Haddock appealed the case to the Supreme Court of the United States. That court held the New York court was not obliged to recognize the judgment and decree of the Connecticut court, as it was devoid of international effect.

The case apparently establishes the principle that the jurisdiction in which the deserting spouse acquires a domicile, after desertion, is powerless to render a decree

(31) 201 United States, 562.

of divorce internationally valid. It also by implication holds that the jurisdiction of the domicile of the married pair, at the time the wrong is committed which may be a ground for divorce, such as desertion, is competent to grant a divorce. The state of New York was the domicile of the married pair at the time of the desertion. Upon this fact the New York court granted a divorce and alimony, thus giving support to the view that the jurisdiction of the domicile of the married pair has authority to grant a divorce. Other cases in which this question has been presented under slightly different circumstances are discussed below.

§ 124. Divorce by courts of domicile retained by wronged spouse. The leading case in which the court of the domicile of the aggrieved party granted a divorce, which was upheld by the Supreme Court of the United States, is Atherton v. Atherton (32). The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicile at the home of the husband in Kentucky, where they continued to reside, and where children were born to them. The wife deserted her husband, left the matrimonial domicile, and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree, the wife, having a residence in New York sufficient under ordinary circumstances to constitute a domicile in that state, sued the husband in the courts of New York for a divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband,

(32) 181 United States, 155.

were pending in their respective states at the same time. The husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded that decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree, and the case was appealed to the United States Supreme Court. That court decided that the courts of New York were bound to give effect to the Kentucky decree. This power to compel the states to give effect to the decrees of other states is derived from the clause in the United States Constitution commanding that full faith and credit be given in each state to the judgments of the courts of other states. The court took the view that where the domicile of the husband is also the domicile of matrimony, the courts of that state may disregard an unjustifiable absence of the wife therefrom and treat her as having her domicile there for the purpose of dissolving the marriage as to both parties.

§ 125. **Divorce by courts of domicile subsequently acquired by wronged spouse.** The Supreme Court of the United States in the Haddock and Atherton cases had no occasion to pass upon the question whether a divorce, granted by a court of the state to which a deserted spouse moved and acquired a domicile, would be valid or not. In those cases the decree was sought in the jurisdiction of the matrimonial domicile from which the offending spouse, against whom the decree was procured, had parted. The case of Ditson v. Ditson (33) presented this additional point. In that case the marriage was celebrated in New York, and the pair, after being in Europe and Cuba, became domiciled in Boston. At that place

(33) 4 R. I., 87.

the husband deserted his wife and went to Europe. The wife, having no means of support, went to live with her father in Rhode Island, and there acquired a domicile. After a desertion by the husband of several years, the wife instituted a suit for a divorce in Rhode Island on the ground of desertion. The court specifically considered the question whether the domicile within its jurisdiction of the complaining party only was sufficient to authorize a valid decree of divorce. It held it had the power, and that such decree would command recognition in the courts of other states.

APPENDIX A.

MUNICIPAL CORPORATIONS.

§ 1. Has a corporation a right to sue for wrongs done to it?

§ 2. Can Jones be taxed on property owned by a corporation of which he is a shareholder?

§ 4. What is the difference between a municipal corporation and a quasi-municipal corporation?

§ 5. What privilege was enjoyed by the early municipal corporations in England in regard to taxes?

§ 10. Which had the earlier origin, municipal or quasi-municipal corporations?

§§ 11, 12. Why was the county of more importance as an administrative unit in the southern American colonies than in the northern?

§ 13. Is the consent of a majority of the inhabitants required before a city or town can be changed into a corporation?

§ 14. How is the power of the legislature to create municipal and quasi-municipal corporations controlled?

§ 15. In the absence of any constitutional provision to the contrary, has a legislature the right to take away a municipal charter without the consent of the inhabitants?

§§ 17, 18. The legislature divides Wilson county into two halves; one half being called Horton county and the other half retaining the old name. Against which county should a creditor bring an action for debts contracted by Wilson county before the division? Either county has sufficient taxable property to pay all the debts.

Would the creditor be without a remedy if the new Wilson county had no taxable property?

§§ 20, 23. The legislature passes an act providing that the public parks in a certain city shall be under the control of a board of park commissioners appointed by the governor. Is there any objection to this act? Is the act valid?

Would the same objections be applicable to an act providing for the establishment of an Industrial School for Girls, the school to be under the control of a board appointed by the governor, and

the county, from which any girl committed under the provisions of the act is sent, to be liable for the expense attending the maintenance of such girl.

§ 24. Brown devises land to the city of X to be used for a municipal home for orphans. The legislature enacts that this land, the title to which is in the city, shall be used for a municipal water-works. Is there any objection to this enactment?

§§ 25, 26. The legislature enacts that money raised in a city by taxation for the purpose of building a city water-works shall be used for the establishment of a state home for incurables. What are the objections to this act?

§§ 29, 30. An act of the legislature provides that all cities which now have an area of between eight and ten square miles, shall install and maintain a certain specified water system for protection from fire. Is this special legislation? Would it be with the word "now" left out?

§ 33. What constitutional provision is commonly found in regard to the choosing of county and city officers?

§ 34. A constitution provides that "all city officers shall be elected by the electors of such cities." Two years after the adoption of this constitution, the legislature enacts that there shall be in each city an inspector to superintend the cleaning of streets. How will these inspectors be chosen?

§ 35. The legislature creates a "Walton fire district" the boundaries of which include the city of Walton and a small neighboring city, and places at the head of this district a fire chief appointed by the governor of the state. The constitution provides that "all city officers shall be elected by the electors of such cities." There has always been a fire chief of the city of Walton, elected by the electors of that city. Is the legislative act unconstitutional?

§ 38. Is the quasi-municipal corporation of today a suable body?

An action is brought by Williams against the county to recover damages for injuries sustained because of the negligence of the county board of health in destroying property as a nuisance which was not in fact a nuisance. Can he succeed?

§ 41. An entertainment is given by the county, in the county court house, the proceeds to be used for county purposes. Carter, who attends, is injured by the breaking of one of the folding chairs, which was negligently left in an unsafe condition. Can he recover from the county?

§ 42. White brings an action against a city for an act of the

city marshal in entering upon his land and pulling up a post, in compliance with the mayor's orders and a written statement of the mayor and city solicitor that the acts were done by the city for the public use in a public street. Can he succeed?

§ 43. Drew brings an action against a city for injuries caused from drinking impure water in a public well, the board of health being the city agency to which was exclusively intrusted the duty of inspection, analysis and care of all public wells. Can he recover?

§ 44. Williams' house is destroyed by fire, originating in a wooden building erected within the city fire limits. The city had notice that the building was to be erected and took no steps to prevent it. Can he recover damages from the city?

§ 45. A city to improve its sanitary condition collected and deposited all the city garbage in one place. This place was unnecessarily and unreasonably near to the plaintiff's house. Can the plaintiff recover damages for sickness produced thereby?

§ 46. Is a city liable for failure to enact an ordinance requiring property owners to fill excavations adjacent to streets, to a person injured by such an excavation?

§ 47. The municipal authorities of a city temporarily suspended an ordinance prescribing a fine of five dollars for permitting horses to stand untied. During its suspension Clark was injured because of a runaway which was left untied. Can he recover damages from the city?

§ 48. Dodson brings an action against a municipal corporation to recover damages for the destruction of his house which was accidentally burned down by sparks from a steam engine used by the proprietor of an adjoining lot. The engine might have been abated as a nuisance under a city ordinance; the corporate authorities had been notified of its dangerous character and had failed to abate it. Can Dodson succeed in his action?

§ 49. Jones puts up a large hanging sign in front of his store. Later he finds out that there is a city ordinance forbidding the erection of such signs. He goes to the mayor and is granted a "special permit" allowing the sign to remain. The sign falls and White, a pedestrian, is injured. Has White an action against the city?

§ 51. The expense of establishing a fire department was assessed by the common council of a city in an irregular and illegal manner. The collectors enforced the assessment by seizure of plaintiff's property. Can plaintiff recover damages from the city?

§ 55. A city gas works was constructed under a legislative charter and placed under the exclusive control of a board of commissioners provided for by the charter and appointed by the mayor. Plaintiff is injured by gas which is negligently permitted to escape from a tank on the premises of the gas works. Can he recover damages from the city?

§ 56. Would it make any difference in the above case if the city derived a revenue from the gas works?

§ 58. A city rents some of its garbage wagons to a coal company. One of the wagons has been negligently permitted to remain in an unsafe condition. Jones is injured because of the condition of this wagon while it is being used by the coal company. Can he recover damages from the city?

§ 61. The bricks of a church building destroyed by fire were taken by the mayor and aldermen and used in the construction of culverts and for other city purposes, by direction of the mayor and under the supervision of the city overseer of streets. Can the church recover the value of the bricks from the city?

§ 62. Can Williams recover from the city for a loss by fire due to the inefficiency of the city fire department?

§ 63. Is the city liable for personal injuries to Buck who fell into a sewer which was in process of construction and which was negligently left insufficiently guarded by officers of the city?

§ 64. A common council committee, arranging for a centennial anniversary, directed the fire department to convene in front of the city hall at midnight, December 31, 1875. Can Watson, who was injured by a city fire engine on that night, recover damages from the city?

§ 68. A city is authorized by its charter to maintain a fire department. Has it power to buy fire apparatus on credit and issue bonds for the same?

§ 70. A city is expressly authorized to borrow money for the purpose of maintaining a small park. Does this include the power to issue bonds?

§ 71. A constitution which took effect January 1, 1895 declared that "all indebtedness" incurred by any city in excess of the limitation imposed thereby, except such as may now exist, shall be absolutely void. Did this provision apply to existing contracts by which a greater indebtedness than the specified limit was incurred after January 1, 1895?

§ 73. A statute required municipal bonds to be endorsed by the city auditor and approved by the chief justice of the municipal court. The city issued bonds which were not endorsed by the city auditor, and which were approved by Rawlston as chief justice of the municipal court, but before his term commenced. Can a recovery be had on these bonds by an innocent purchaser for value?

In another city each municipal bond of a certain issue was styled on its face "Improvement Bond" and, as required by statute, referred by date to an ordinance as the source of authority for their issuance. The ordinance was invalid. Can a holder in due course recover on one of these bonds?

§ 75. A city has no money in the treasury and has reached the limit set by the constitution to its indebtedness. It buys a fire boat from plaintiff on credit. Has plaintiff any action against the city?

APPENDIX B.

PUBLIC OFFICERS.

§ 1. How is administrative law distinguishable from constitutional law?

§ 4. A state abolishes a state office not created by constitution, and stops the salary of the officer before his term of office has expired. Does this violate the Fourteenth Amendment?

§ 5. Williams is appointd by the state legislature to take care of the state industrial school for four years at a salary of $2,000 a year. At the end of the second year the act is repealed. Has Williams any action?

§ 6. The governor of a state without constitutional authority creates the office of state road inspector. Jones who has filled this office for three years brings an action against the state for his salary. Can he succeed?

§ 8. Can there be a public officer without any duties?

§ 10. The constitution of the United States provides that no person "shall be eligible to that office (president) who shall not have attained the age of thirty-five years." Is a person who is thirty-four years old when elected, and who becomes thirty-five before inauguration the president?

§ 12. By common law could one under age hold the office of judge?

§ 13. Can a woman hold the office of smoke inspector in a city where male suffrage prevails?

§ 15. The constitution of a state forbids making political belief a qualification for office. A law is passed providing for the appointment of a board of five tax commissioners, one member to be from the leading political party in the state. Is the law unconstitutional?

§ 17. The law provides that one person shall not hold more than one lucrative position. The governor of the state is elected mayor of a city. For which office is he disqualified?

§ 18. Under the civil service what preference is given to those honorably discharged from the military or naval service of the United States?

§ 20. The law provides that no ballots shall be received by the inspectors of a city election unless the person offering to vote has been duly registered. Buck lives in a town which is annexed to the city after the registration day but before the election day. Has Buck a right to vote in the city election?

§ 21. Black ink is furnished in all the voting booths. One ballot is marked with red ink. Does this invalidate the ballot?

§ 22. What is meant by limited voting?

What is its object?

§ 23. Where three representatives were to be elected the law provided that each voter might vote for three or cast one and one-half votes for each of two. Is there any objection to this law?

§ 24. There are 10,000 eligible voters in a city. There are three candidates, Jones, Dodson and Parker for the same office. 5,000 voters go to the polls. 3,000 votes are cast for Jones. Dodson receives 900 and Parker 1100. Later it is discovered that Jones died before the election. 300 of the votes cast for Parker are invalidated because of distinguishing marks upon them. Who is elected to the office?

§ 25. The law provides that pens and ink with which to mark the ballots should be furnished to all voters, and that all ballots should be marked with ink. The election commissioners provide only lead pencils and all the ballots are marked with these. Are the ballots invalid?

§ 26. Has the court power to determine to what party a nominee belongs?

§ 27. What provision is made for nominees of small political parties?

§ 29. A law confirming the voting at a primary to party members prescribes as a test of party membership that the elector "intends to vote for all the candidates of such party at the next election." Is the law valid?

What is meant by an open primary?

§ 30. What is a direct primary?

§§ 32, 33. What is the doctrine of the separation of powers? In what cases does the legislature have power to appoint officers?

§ 34. The constitution of a state gives the governor power to appoint a sheriff. The legislature passes an act providing that the governor's power to appoint shall be confined to the person receiving the highest number of votes of all the eligible voters in the state at a special election held for that purpose. Is the law constitutional? Suppose it had been confined to one of the highest three?

§ 35. Is an oral appointment to office valid?

§ 37. Can an appointee be compelled to accept an office?

§ 38. A person chosen as collector refuses to find sureties for the faithful discharge of his official duty according to the terms of his election. Has he accepted the office?

§ 44. The mayor thinking the chief of police, who has disappeared, to be dead, appoints Watson to fill the "vacancy." Watson, for two years, performs all the duties of the office and is generally recognized as the chief of police. Later it is found out that the former chief is living. Are the acts done by Watson valid?

§ 45. White is appointed tax collector. Green has already been appointed to the same office and his term has not expired. White performs all the duties of the office for six months. Is White a de facto officer?

§ 46. A certificate of election states that three persons have been elected to an office which by statute has but one incumbent. Is one of these persons who for some time has performed the duties of the office a de facto officer?

§ 47. Is it possible to have two or more de facto officers for the same office?

§ 48. An act of the legislature of California created Mono county, making its eastern boundary the eastern boundary of the state, making Amora the county seat, and prescribing duties for certain officials, who were duly elected and performed the duties prescribed. Afterwards, when the boundary between California and Nevada was definitely located, Amora was found to be in Nevada where also lived the officials. Were the officials de facto officers of Mono county?

§ 49. A de facto officer brings an action for salary. What decision?

§ 51. When does death not render an office vacant?

§ 54. The mayor is given power by the legislature to appoint street inspectors. He removes an inspector for cause. The inspector claims that he is entitled to a trial at law first. What can be said in support of his claim and against it?

§ 62. Would it make any difference if the tenure of office of the street inspector had not been fixed by law?

§ 68. Are the offices of school director and judge of election incompatible?

§ 72. A recorder of deeds is given power to amend clerical errors in the records made by him. Jones was recorder of deeds.

Two days after the expiration of the term of his office he discovers a clerical error in the records which he has made. Has he power to amend?

§ 75. A law provides that buildings used in connection with educational institutions shall be exempt from taxation. Another law provides that the taxes as fixed by the board of assessors shall be conclusive unless a complaint is filed after the levying and before the day when payment is due. The board fixes a tax on a college dormitory. No complaint is filed. Can payment be enforced?

§ 78. A statute provides that before March 1, 1908, the board of assessors shall appraise all personal property and levy an assessment upon it. In April, 1908, the board performs this act. Is the tax valid?

§ 81. Is a smoke inspector permitted to delegate his duties?

§ 85. The law says that second class mail matter shall contain no writing. A postmaster refuses to deliver a newspaper mailed as second class matter, upon the wrapper of which is written an initial letter, not a part of the address or return. Is the postmaster's decision that this is not proper second class matter, final?

§ 94. Has a mayor the right of direction over an officer appointed by him?

§ 96. Is there a right of appeal from the head of a department to the president?

§ 97. A board is composed of nine members. All have notice of a meeting. Five attend. Three vote for a resolution, two vote against it. Is the resolution passed by the board?

§ 100. There is a law passed which prohibits the selling of liquor on Sunday. Will mandamus lie against the chief of police to compel him to close a saloon which is kept open on Sunday?

§ 103. What are the three classes of administrative powers?

§ 109. The board of fish and game commissioners summarily destroys illegal seines found in a river. Is the action valid?

§ 118. The title of a treasurer was not judicially determined until after the expiration of his term of office. He obtained no commission from the governor and gave no bond as required by statute. The salary of the office during the meantime was paid to the former treasurer who held over. Has the de jure treasurer an action for his salary? Against whom?

§ 124. Congress passes an act establishing the office of inspector of canals at a salary of $2,000 a year. Has such an officer a right of action in the court of claims for his salary?

A collector of customs appointed under an act of Congress wrongfully detains goods. Does an action for damages against the United States lie in the court of claims?

§ 127. Can a county treasurer be held personally liable on a note signed by him as treasurer without authority?

§ 130. Will an action for damages lie against a recorder of deeds for wrongfully refusing to record a deed?

§ 131. A street inspector is ordered by the board of highways to destroy a small shed. The order under which he acts states that the shed is situated on a public highway and is an obstruction. The inspector destroys the shed. Later it is discovered that the shed was on private property. Has the owner an action for damage against the inspector?

APPENDIX C.

EXTRAORDINARY REMEDIES.

§ 3. Will mandamus lie against a street paving company whose bid for paving has been accepted by the city to compel it to complete the work?

§ 4. Will mandamus lie against the chief of police to compel him to enforce an ordinance which provides that all gambling houses are illegal and shall be closed?

A clerk is required by law to grant a marriage license to any person who pays the required fee and makes affidavit that he is more than twenty-one years of age and is not already married. Jones pays the fee and makes affidavit as required. The clerk personally knows that Jones is only nineteen years of age and refuses to issue the license. Will mandamus lie?

§ 5. Would it make any difference in the preceding question if an action for damages would lie against the clerk for his refusal to issue the license? Or if a statute provided for an appeal to a superior officer?

§ 6. In what courts will mandamus lie against Federal officers?

§ 7. Will mandamus lie against a former officer who holds over after the expiration of his term to compel him to turn over the books and records of the office to a candidate who holds a proper certificate of election?

§ 9. Will mandamus lie against a telephone company to compel it to install a telephone?

§ 10. Will mandamus to compel a railroad company to stop its cars at a certain station, established by the charter, be granted to a person who does not wish to get on or off trains at that station?

§ 12. How is the writ of prohibition distinguishable from injunction?

§ 13. The common council of a city commences an investigation of charges preferred against the counselor of the city with a view to his removal from office. There is no charter provision giving the council the power of removal. Will prohibition lie to prevent the council from proceeding with the investigation?

An act is passed forbidding the issuance of liquor licenses. Will prohibition lie to prevent the city clerk from issuing licenses, upon the payment of a fee and an affidavit of good character, as was his duty before the act?

§ 16. Quo warranto is brought to try the title to office of state senator? Is this the proper method?

§ 18. Will quo warranto lie against an officer to test the constitutionality of the act by which the office was created?

§ 19. A city, without charter authority, and without granting any written licenses or permits, indirectly licensed sales of liquor and obtained revenue therefrom by imposing taxes on the persons selling. Will quo warranto lie to compel the city to desist from this practice?

§ 20. Is quo warranto the proper remedy to prevent a company authorized by its charter to engage in the business of fire insurance from carrying on the business of marine insurance?

§ 21. A newspaper company publishes a libel against Warren. Can he compel the company to forfeit its charter by means of an action in the nature of a quo warranto?

§ 23. Dodson asserts that he is a director of the Smith Company, having been elected to the office at a stockholders' meeting. Green, a stockholder, contends that the meeting was irregular and that there was not a quorum present. Can Dodson's title to the office be tried in quo warranto?

§ 26. Would it make any difference in the preceding question if the relator were not a stockholder? Suppose the relator had been an unsuccessful candidate for the same office?

§§ 28, 31. A city board of health is authorized to order the suppression of a nuisance after giving a reasonable notice to the person against whom the maintenance of the nuisance is alleged. The board issues such an order without notice. Will certiorari lie?

Will certiorari lie to review an alleged unlawful and fraudulent sale of a school house by two of the school-district officers?

A board of health is authorized to order the removal of nuisances. It orders Williams to remove a pile of garbage from his property, the order stating that the garbage is a nuisance. Williams claims it is not a nuisance. Will certiorari lie to review the action of the board?

§ 35. On March 1, 1905, Jones received his discharge in bankruptcy as an insolvent debtor. On April 10, 1905, he was arrested on an execution issued on a judgment recovered against him before

his discharge and while he was applying for the benefit of the act. April 16 he applies for a writ of habeas corpus. What decision?

§ 37. Is the refusal to allow a United States citizen to land such a detention as to entitle him to a writ of habeas corpus?

§ 38. In what sense is habeas corpus a writ of right?

§ 44. Is a person released on bail entitled to the writ of habeas corpus?

§ 48. How is an injunction distinguishable from the writ of mandamus?

§ 50. A statute provides that stock in national banks shall be exempt from taxation. The board of assessors taxes Jones on some national bank stock. Is prohibition or injunction the proper remedy?

§ 51. A number of persons incorporate under a general banking law. They call themselves the Englewood bank, but engage solely in the insurance business. Is injunction or quo warranto the proper remedy to compel them to stop writing insurance?

§ 54. A board of commissioners is given power to condemn and destroy bridges which "seriously interfere with navigation." The board condemns a bridge. The owner of the bridge contends that it does not interfere with navigation. How can the question be determined?

APPENDIX D.

CONFLICT OF LAWS.

§ 1. What is the origin of the law known as conflict of laws?

§§ 2, 3. Wilson claims that he is a citizen of the United States and therefore entitled to admission. The board of immigration commissioners contends that he is a citizen of a foreign country which has no treaty with the United States and therefore cannot claim the protection of the United States constitution and is not entitled to admission. Does the law applying to such a case come within the subject of conflict of laws?

§ 5. By what laws are the first settlers of an uninhabited country governed?

§§ 6, 7. When an inhabited country is settled by migration, what laws govern?

§ 10. A citizen of Indiana on board a ship which sailed from Seattle makes a will which conforms to the laws of the state of Washington, but which would have been invalid if made in Indiana. Is the will good?

§ 12. To what criminal law is a vessel sailing from New York subject after it reaches the high seas?

§§ 14, 17. The captain of a United States ship in the port of Southampton publishes a newspaper on board the ship that contains statements about the King of England which by the laws of England would make him guilty of the crime of lese majesty. Can he be punished? Would it make any difference if the ship were a United States war vessel?

§ 22. What criminal laws govern an English vessel on the high seas within a marine league of the coast of Florida? What civil laws?

§ 23. What laws are applicable to inland bays formed by the high seas, which are less than two marine leagues from headland to headland?

§ 24. What laws govern land added by discovery?

§ 25. An island inhabited by barbarians is added by conquest. What laws govern it?

§ 26. If Mexico should peaceably cede land to the United States, what laws would govern the land so ceded?

§ § 27, 31a. Can an Illinois shipper sending goods to Indiana bring an action in the Illinois courts against the railroad for charging an unfair rate?

§ 32. What laws will the Federal courts apply to a commercial transaction taking place in the state of Ohio?

§ § 35, 36. How does it happen that the same act in regard to a Federal subject might be a crime in one state and not in another?

§ § 37, 38. An American commits a crime on an American ship lying in a Chinese harbor. Will he necessarily be tried according to the Chinese law? In what way can he get the benefit of a trial according to the principles of American law?

§ 44. Could a man's business office be called his domicile?

§ 46. A woman whose husband is domiciled in Chicago gives birth to a child while traveling in Germany. Where is the child's domicile?

§ 49. Watson living in Chicago intends to move to Indianapolis. He rents a house there and has all his belongings moved in. He is delayed in Chicago by business matters but his family and servants go on ahead. He dies before leaving Chicago. Where was his domicile immediately before his death?

§ 50. Where is a person domiciled who has abandoned his home in the United States and is traveling in England looking for a new home?

§ 51. Jones, a resident of Louisville, leaves there with the intention of making his home with his brother who lives in Texas. Upon his arrival in Texas he learns that his brother has moved out on the plains, his exact whereabouts being unknown. He spends a year looking for his brother. Where was his domicile during this year?

§ 52. Where is the domicile of an arctic explorer, who has been traveling for two years in the far north?

§ 53. A child when a mere baby is kidnaped and taken to another state. The child grows up in ignorance of the fact that he was kidnaped. Where is his domicile?

§ 54. The Wilson company obtained its charter from New Jersey. It does business in New York. Half of the incorporators live in Illinois and half in Indiana. Where is the domicile of the corporation?

§ § 56, 57. A resident of X state makes an oral contract in Y state with Williams agreeing to work for him as a confidential secretary for two years beginning a year from the following June. By

the laws of Y state such a contract has to be in writing to be binding but not by the laws of X state. Is the contract binding?

§§ 58, 61. John and Mary are domiciled in a country where a marriage ceremony performed after 10 p. m. is valid. They are married in England after 10 p. m. A marriage ceremony at that time in England is void. Would the marriage be held valid by the English courts? By the courts of the country where John and Mary are domiciled?

§§ 64, 65. By the laws of one state a contract for the sale of a chattel of a value of more than fifty dollars must be in writing. A resident of this state makes such a contract in a state where there is no such law. Is the contract valid?

§§ 66, 67. By the laws of X state when a vendor sells a chattel and remains in possession, an innocent purchaser from him is protected as against the first vendee. There is no such law in Y state. A resident of Y state sells a chattel situated in X state. The vendee allows the vendor to remain in possession. The vendor then sells the chattel to Watson who has no knowledge of the prior sale. The first vendee brings replevin against Watson. What decision?

§ 70. By the laws of X state a contract to sell land must be in writing. There is no such law in Y state. Jones, a citizen of X state, makes an oral contract to sell land situated in Y state. Is the contract valid?

§ 72. A person in Kansas makes a deed to land situated in Ohio. What laws govern the making of this deed?

§§ 75, 76. What law regulates the interest of a wife in her husband's personal property. What is meant by matrimonial domicile?

§§ 78, 80. A man and wife have their matrimonial domicile in Kansas. After marriage the man acquires property in Illinois. By what laws is the dower right of the wife in this land determined? Would it make any difference if the matrimonial domicile is changed to Illinois?

§ 83. In X state a wife gets all of the personalty of her husband who dies intestate. In Y state she gets one half. Jones, whose domicile is in X state, dies leaving an invalid will and $700 worth of personalty in X state and $500 worth in Y state. How much of this is his widow entitled to?

§§ 87, 88. Jones who has his domicile in Illinois while traveling in Ohio makes a will of personalty situated in Kansas. The will conforms to the laws of Ohio, but not to the laws of Illinois or

Kansas. After making the will but before he dies, he changes his domicile to Ohio. Is the will valid?

§ 89. A resident of Illinois makes a will subscribed by two witnesses devising realty in Maryland. By the law of Maryland three subscribing witnesses are necessary to make a good will. In Illinois two are sufficient. Is the will valid?

§§ 92, 93. In X state the crossing out of the signature to a will revokes it. This is not the law in Y state. Jones, domiciled in Y state, makes a will devising realty and personalty. The realty is situated in Y state. When Jones is in Y state he crosses out the signature to his will with an intention to revoke it. Jones dies in X state. Is the will valid in regard to the personalty? In regard to the realty?

§ 98. What courts have jurisdiction over a person temporarily absent from his domicile?

§ 102. What is the mode of serving process on corporations?

§ 103. A company incorporated in New Jersey is doing business in Illinois. The president of the company with his family is on a pleasure trip to California. While passing through Illinois he is served with process. Is such service binding on the corporation?

§ 104. Williams is domiciled in Indiana. Buck wishes to bring suit against him in an Illinois court. Buck goes to Indiana and serves him with process there. Is this service sufficient to permit a suit in Illinois?

§§ 107, 108. Jones, domiciled in Kentucky, trespasses on Green's land in Ohio. Green serves Jones with process when he is in Kansas and brings an action for the trespass in a Kansas court. What decision?

§ 111. White's land in Texas is sold for non-payment of taxes to Farson, who is domiciled in Illinois. White claims that he still has title on the ground that the tax was illegal. What court has jurisdiction of a suit by White to quiet title?

§ 115. What is a proceeding quasi in rem?

§§ 117, 118. Dawson domiciled in Indiana while traveling in Illinois leaves a suit of clothes with a tailor in Chicago to be altered. He leaves the state without calling for the clothes or paying the bill. The tailor seizes the clothes, serves notice on Dawson by publication and later obtains a judgment against him. Is the judgment good?

§ 119. What is the general rule in regard to the jurisdiction of courts to grant a decree of divorce?